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No. (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ASHCRAFT,
As Personal Representative
of the Estate of Edna P.
McGlothin, Deceased

Petitioner

v.

VILLAS WEST II OF
WILLOWRIDGE HOMEOWNERS
ASSOCIATION, INC.

Respondent

On Petition For Writ Of Certiorari
To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

Does the Homeowners Association of 149 private individuals, commit a discriminatory housing practice when it enforces a restrictive covenant prohibiting renting so as to make unavailable and to deny dwellings within the subdivision to 56% of all racial minority householders (including 54% of all African American householders) in the community?

Is McGlothin who is aggrieved by the discriminatory housing practice of a group of private individuals required to prove as a condition of recovery that the group of private individuals had available to them an equally effective, non-discriminatory alternative to maintain property values?

Does the purpose of the Homeowners Association to protect property values by a practice which restricts 56% of all racial minority householders from the subdivision take precedence over the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States?

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Statement Of The Basis For Jurisdiction In The United States Supreme Court

McGlothin seeks review of the decision of the Indiana Supreme Court granting transfer with opinion entered May 15, 2008.

The Indiana Supreme Court denied rehearing on October 1, 2008. Appellant's Appx. p. 132.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the decision of the Indiana Supreme Court on writ of certiorari is 28 U.S.C. 1257.

Statutes Involved In The Case

Applicable provisions of 42 U.S.C. 3601, et seq. read:

Sec. 800. [42 U.S.C. 3601 note] Short Title
This title may be cited as the "Fair Housing Act".

Sec. 801. [42 U.S.C. 3601] Declaration of Policy
It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Sec. 802. [42 U.S.C. 3602] Definitions
As used in this subchapter–

* * *

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

* * *

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code], receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of this title.

* * *

(I) "Aggrieved person" includes any person who–

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured

by a discriminatory housing practice that is about to occur.

* * *

Sec. 804. [42 U.S.C. 3604] Discrimination in sale or rental of housing and other prohibited practices

As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful–

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

* * *

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

* * *

Sec. 813. [42 U.S.C. 3613] Enforcement by Private Persons

(a) Civil Action. –

(1)

(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a

conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

* * *

(c) Relief Which May Be Granted. --

(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs . . .

STATEMENT OF THE CASE

Appellant's decedent Edna McGlothin (herein "McGlothin") is the owner of a dwelling in Villas West II Subdivision, Kokomo, Indiana, and as such is a member of Villas West II of Willowridge Homeowners Association, Inc. (herein "the Association"). On October 10, 2002, the Association filed a complaint against McGlothin in the Howard Superior Court, Kokomo, Howard County, Indiana, alleging that McGlothin was violating a covenant against leasing her dwelling and requesting injunctive relief that McGlothin stop renting and

evict her tenant. Appendix, p. 1. McGlothin first raised the federal questions sought to be reviewed by her counterclaim filed January 10, 2003 that the covenant against leasing "evidenced an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin," and that the covenant "has a discriminatory effect on the availability of housing within the subdivision in violation of the Fair Housing Act." Appendix, p. 35, 41. McGlothin asked that the covenant be declared void in violation of the Fair Housing Act.

The federal questions sought to be reviewed were first raised by McGlothin's counterclaim to the court of first instance, the Howard Superior Court, Kokomo, Howard County, Indiana, and were thereafter raised in McGlothin's Appellee's Brief to the Indiana Court of Appeals, by McGlothin's Brief in Response to Petition Seeking Transfer to the Indiana Supreme Court. They were presented in oral argument before the Indiana Supreme Court and in McGlothin's Petition for Rehearing to the Indiana Supreme Court.

Issues were tried to the Howard Superior Court on October 14 and 15, 2004. The Decision of the Court containing Findings of Fact, Conclusions and Judgment declaring the covenant against leasing void and of no force and effect was entered March 10, 2005. Appendix, p. 46.

The Association raised this issue to the Indiana Court of Appeals,

"Whether the trial court's judgment that

> the restrictive covenant against leasing violated the Fair Housing Act, 42 U.S.C. §3601-3619, is clearly erroneous."

The Indiana Court of Appeals affirmed the trial court's judgment declaring the covenant void on January 30, 2006. Villas West II of Willowridge Homeowners Association v. Edna McGlothin, 841 N.E. 2d 584, 608 (Ind. Ct. App. 2006). Appendix, p. 60.

The Association filed Petition to Transfer to the Indiana Supreme Court. On May 15, 2008, the Indiana Supreme Court reversed the decision of the Indiana Court of Appeals and the judgment of the trial court on McGlothin's counterclaim of disparate impact and remanded for reconsideration McGlothin's claim of intentional discrimination. Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 2d 1274, 1285 (Ind. 2008). Appendix, p. 110.

The Indiana Supreme Court found the trial court's Findings of Fact Number 33 to be clearly erroneous. That Findings of Fact reads,

> "33. However, the Declaration of Covenants contains numerous provisions requiring proper maintenance; these include the following, which are included herein by reference:
>
> Article V. Sections 1
> Article V. Sections 2
> Article V. Sections 2-A
> Article IX. Sections 3(a)
> Article IX. Section 3(c)

Article IX. Section 3(d)
Article IX. Section 3(e)
Article IX. Section 3(f)
Article IX. Section 3(g)
Article IX. Section 3(I)
Article IX. Section 3(j)

> The Plaintiff has, by these provisions, more than adequately assured a neat, clean and visually attractive environment, and a high degree of property maintenance. The Defendant would still be held to these requirements even while renting her home. Therefore, the Plaintiff's justification for the no-rent provision lacks a factual basis, and is mere subterfuge, rendering said provision unnecessary and useless."

The Indiana Supreme Court considered the case as one of disparate impact and held Finding of Fact Number 33 to be clearly erroneous on the basis that the other covenants cited by the trial court were not "equally adequate to maintain property values" as the no-rent covenant. "Because Plaintiff (McGlothin) points to no equally effective, less discriminatory alternatives to the defendant's (Association's) legitimate nondiscriminatory policy, that policy does not support a disparate impact FHA violation, even if it has a disparate impact on a protected class." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E.2d 1278, 1284 (Ind. 2008) rehearing denied. Appendix, p. 127.

McGlothin again raised the question of discriminatory impact to the Indiana Supreme Court

in her Petition for Rehearing. McGlothin's Petition for Rehearing was overruled without opinion on October 1, 2008. Appellant's Appendix p. 132.

Facts Material to Consideration Of the Question Presented

Facts material to consideration of the disparate impact on persons of different races and discriminatory impact which the restrictive covenant has on the community are set forth in the trial court's Decision, Findings of Fact and Conclusions. The Findings of Fact and Conclusions appear at Appendix, p. 46 and are set forth verbatim in the decision of the Indiana Court of Appeals. Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 841 N.E. 2d 584, 589 (Ind. Ct. App. 2006). Appendix, p.60.

The following facts are material for consideration in support of this Petition.

Villas West II Planned Unit Development of Willowridge Subdivision ("Villas West II") was developed by the Jim Bagley Construction Co., Inc. Tr.p.151, l. 25-p.152, l. 2. The subdivision is located in the City of Kokomo, Howard County. There are 149 lots in Villas West II. Tr.p.62,l.22-p.63, l.6.

On April 2, 1992, the developer published and recorded covenants for the Villas West II of Willowridge Homeowner's Association, Inc. ("the Association") which contain the following provisions:

> "Lease of Dwelling By Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of owners with regard to

financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family." Amended Declaration of Covenants. Appendix p. 28.

The covenants prohibit all renters from living in the neighborhood. Tr. p. 333, ll. 20-24; Tr. p. 349, ll. 19-22. Therefore, the covenants remove housing units within Villas West II from the rental market.

The Associations's reason for excluding renters from the subdivision is that the covenants have an affirmative effect on property values, meaning that they either increase or maintain property values. The reasoning is that, in most cases, homes which are rented in neighborhoods which allow renting are not as well maintained as homes which are owner occupied. Tr. P. 65, l. 24 - p.66, l. 11.

Jim Bagley Construction Co., Inc. advertises Villas West II as part of its "Willowridge Community" as having city school system, city water, city sanitary sewers, city fire protection, city police protection, wide city streets, free city trash pick-up. The advertisement describes the subdivision as "Restricted - your investment is protected here." Exhibit U.

The word, "restricted," is defined by Webster's Third International Dictionary (1993), as "limited to the use of a particular class of people or specifically excluding others (as members of a class or ethnic group felt to be inferior) (a - residential area) (- hotels..." Other dictionary definitions include" ... limited to white Christians," and "...limited to or

admitting only members of a particular group or class, esp. white gentiles." Exhibit DD.

There are two (2) known African-American householders who own homes in Villas West II. Tr. p. 320, ll. 3-6; Tr. p. 325, ll. 18-21. With 149 lots in Villas West II, the racial mix of Villas West II is 98.7% white homeowners to 1.3% African-American homeowners. According to the U. S. Census Bureau 2000 Census the population of the City of Kokomo is 46,113. 39,242 of those are white persons and 6,023 are persons of races other than white. 4,770 are classified as African-American. The racial mix of the City of Kokomo is 86.69% white to 10.54% African-American and 2.77% other racial minorities. Exhibit R, DP-1.

2,080 or 44% of the African-American population resides in Census Tract 2, which is a relatively small area located east and northeast of Kokomo's downtown business area. Exhibit R, H11 , H12B. The area is designated by the City of Kokomo as a low-moderate income area. Exhibit S. In that Census Tract 370 units are renter occupied and 519 are owner occupied by African-American householders. Exhibit R.

In the City of Kokomo, there are 1,925 housing units which are occupied by African-American householders. 889 of those are occupied by householders who own units and 1,136 are occupied by householders who rent units. 54% of African-American householders in the City of Kokomo rent their dwellings. Exhibit R, H 14; Exhibit CC. The average household size of housing units occupied by African-American householders is 2.4 persons.

Exhibit R, H12B, 1,036 X 2.4 = 2,486 persons live in African American rented housing units. The covenants effectively exclude 1,036 African American householders, that is 54% of all African American householders, representing 53% of the African American population, from the subdivision. Exhibit CC.

In the City of Kokomo there are 2,602 housing units which are occupied by racial minority householders. 1,156 of these are occupied by householders who own units and 1,446 of those are occupied by householders who rent units. 56% of all racial minority householders in Kokomo rent their dwellings. All of those racial minority householders are excluded from the subdivision. Exhibit R, H14, Exhibit CC. Appellee's App. pp. 4 & 19

There are 18,827 housing units which are owned or rented by white alone householders. 6,431 are renter occupied. 6,431 ÷ 18,827 = 34% of white alone householders are excluded from the subdivision by the covenants. The covenants exclude 56% of racial minority householders and only 34% of white householders from the subdivision. African American householders in Kokomo are far more likely to rent their homes than white householders. For example, comparing 30 year old persons with $40,000 per year income, an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home. Tr. P. 273, l. 23- p.274, l. 18.

By the Association's evidence, 27% or 28% of African American households have income sufficient to rent homes in Villas West II if such homes were

available. Exhibit 4. Tr. p. 73, l. 3 - p. 74, l. 17.

ARGUMENT

McGlothin Made Prima Facie Cases of Discriminatory Impact and Disparate Impact.

The restrictive covenant in question reads,

> "Lease Of Dwelling By Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family." Findings of Fact No. 3, Appendix, p. 47.

Villas West II of Willowridge Homeowners Association, Inc. is an association of the 149 private persons who own homes in the Villas West II subdivision. The Villas West II subdivision is advertised as having city school systems, city water, city sanitary sewers, city fire protection, city police protection, wide city streets, and free city trash pickup.

By the restrictive covenant the 149 members of the Association segregate themselves as homeowners who occupy their dwellings from all persons who rent dwellings and persons who occupy rented dwellings in the City of Kokomo. The racial mix of the Association is 98.7% white to 1.3% African American. 56% of all racial minority householders rent their dwellings. 54% of African American householders

rent their dwellings. 53% of the African American population of Kokomo live in rented dwellings. The covenants prevent all of those minority persons from living in the subdivision and enjoying the advertised advantages. That is the case for discriminatory impact on the community. The case for disparate impact is made by adding the fact that only 34% of white householders rent their dwellings.

The case for disparate impact is made stronger by the testimony of Dr. Nathan Lauster, a sociologist with the Minnesota Population Center. The Minnesota Population Center is the preeminent center for dealing with Census data in the United States. Based on his analysis of the statistical data, Dr. Lauster concluded that the no-rent covenant has a major effect on the racial minority householder because a racial minority householder is far more likely to rent than to own regardless of income and age. Tr. p. 279, ll 6-13. Dr. Lauster compared 30 year old persons with $40,000 per year income and concluded that an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home. Tr. p. 273, l. 23-p.274, l. 18; Findings of Fact No. 26, Appendix, p. 54.

The "evidence presented at trial establishes that McGlothin made a significant statistical showing of disparate impact." Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 841 N.E.2d 584, 604 (Ind. Ct. App. 2006). Appendix, p. 98.

The Association acts unlawfully under 42 U.S.C. 3604(a) when it enforces a restrictive covenant which make unavailable and denies dwellings within the

subdivision to the protected class of 1,446 racially minority householders who rent their homes in the City of Kokomo. The Association acts unlawfully under 42 U.S.C. 3604(b) when it makes, prints and publishes its restrictive covenant in its Amended Declaration of Covenants which appear as public records in the Office of the Recorder of Howard County. Appendix, p. 5. By the provisions of the Fair Housing Act, the enforcement of the restrictive covenant and the making, printing and publishing of the restrictive covenant are discriminatory housing practices under 42 U.S.C. 3604. McGlothin claims to have been injured by the discriminatory housing practices in that the practices prevent her from renting her dwelling. That makes McGlothin an aggrieved person under 42 U.S.C. 3602(I). McGlothin is asking that the covenant be declared void pursuant to 42 U.S.C. 3613(a)(1)(A) and 42 U.S.C. 3613(a)(2)(c).

The Covenant Perpetuates Segregation And Thereby Prevents Interracial Association.

If the enforcement of the restrictive covenant perpetuates segregation and thereby prevents interracial association, it is considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups. Metropolitan Housing Development v. Village of Arlington Heights, 558 F. 2d 1283, 1290 (7 Cir. 1977), (hereinafter "Arlington Heights II)").

The communities involved are the racially

minority householders who rent homes in Kokomo, householders who own homes in Villas West II, racially minority persons who live in rented homes in Kokomo, and the Kokomo community. Census Tract 2 in the City of Kokomo is a low to moderate income area and has a relatively high concentration of black population. Census Tract 2 is located in northeast downtown Kokomo. Tr. p. 146, L. 25-p. 147, l. 9; Exhibit S. Of the 889 units which are owned by African American householders in Kokomo, 534 are in Census Tract 2. Exhibit R, Table H14, H11. That is, 60% of all African American householders who own homes, own their homes in Census Tract 2. That means that only 40% of African American owned homes are outside of Census Tract 2. On the other hand, of the 1,036 African American renter occupied units, only 370, or 36%, are in Census Tract 2. Exhibit R, H14, H11. That means that 64% of African American householders who rent, rent units outside of Census Tract 2. With 64% of African American rental units outside Census Tract 2 representing 1,591 persons, and only 40% of African American owned homes outside of Census Tract 2, representing 893 persons, it is apparent that the incidence of interracial association between white persons and African Americans outside Census Tract 2 is much greater through African American householders who rent than through those who own homes. To put it another way, the threat of integration to a 98.7% white community such as Villas West II is far greater through the rental market than through the ownership market.

"Conduct that has the necessary and

> foreseeable consequence of perpetuating segregation can be as deleterious as purposeful discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." Arlington Heights II, supra. 1289, Traffriante v. Metropolitan Life Insurance Company, 409 U.S. 205, 211, 93 S. Ct. 3645, 34 L. Ed. 2d 415 (1972) citing 114 Cong. Rec. 3422 (remarks Sen. Mondale).

By limiting occupancy to owners and members of their immediate families and preventing owners from renting their dwellings, the Association limits the interracial association of its members to those among racial minorities who can afford to buy. The exclusion of 56% of racial minority householders who rent denies members of the Association all opportunity for interracial association with that segment of the minority population. The policy requires those minority persons to find rental housing elsewhere, thereby perpetuating segregation. Kokomo will not achieve balanced living patterns until African American householders find their way out of Census Tract 2 into other areas of Kokomo. Kokomo can never achieve balanced living patterns so long as homeowners in Villas West II, whether white or black, segregate themselves so as to prevent all interracial association with 56% of all racial minority householders. Therefore, the policy of the Association in enforcing its restrictive covenant forbidding owners from renting their dwellings is

invidious under the Fair Housing Act independently of the extent to which it produces a disparate treatment on different racial groups. If our national commitment is to replace ghettos with truly integrated and balanced living patterns, each neighborhood, including Villas West II, must provide opportunities for racial minority householders who rent as well as for those who can afford to buy. Arlington Heights II., supra., 1290.

The trial court found,

> "The covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority householders who could rent homes in the subdivision if homes were available." (Finding of Fact No. 28, Appendix p. 54).
>
> "The covenants along with similar covenants in other subdivisions have the effect of shifting the burden of the rental market and the attendant interracial association with minorities who live in rental houses to other neighborhoods." (Finding of Fact No. 31, Appendix p. 55.)

In abandoning the Arlington Heights II, supra, methodology, the Indiana Supreme Court obviates recovery on this basis because the court does not recognize the extent of the discriminatory impact on the communities, and there is no place for the

concepts of the perpetuation of segregation and prevention of interracial association in the Indiana Supreme Court's burden shifting process.

The State Court Has Decided an Important Question of Federal Law in a Way Which Conflicts With the Decision of the U. S. Court of Appeals

The Indiana Supreme Court has decided important federal questions arising under the Fair Housing Act in a way which conflicts with the decision of the United States Court of Appeals, Seventh Circuit, in Arlington Heights, II, supra.

Applying Arlington Heights, II, supra., factors, both the trial court and the Indiana Court of Appeals concluded that the Association's restrictive covenant violated the Federal Fair Housing Act because of its disparate impact on members of the African American community residing in Kokomo. Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1286 (Ind. 2008) (Justice Rucker dissenting). rehearing denied. Appendix p. 131.

The majority opinion of the Indiana Supreme Court acknowledges that federal district courts in the Seventh Circuit are obligated to follow the Arlington Heights, II, supra., methodology. However, the court states that the Indiana Supreme Court is not so restricted. Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1282 (Ind. 2008) rehearing denied. Appendix p. 122.

The Indiana Supreme Court abandons Arlington Heights, II, supra., approach of weighing factors and

adopts a method of burden shifting which accommodates two of the Arlington Heights, II, supra., factors by "considering the discriminatory effect of the challenged practice and the defendant's interest necessitating it." The court says,

> "In sum to establish a right to disparate impact recovery under the FHA, a plaintiff must establish a prima facie case by demonstrating that a policy or practice actually or predictably has a significant adverse or disproportionate impact on a protected class. To rebut this showing, the defendant must demonstrate that its policy or practice has a manifest relationship to a legitimate, nondiscriminatory interest. The plaintiff may then overcome the defendant's showing by demonstrating that a less discriminatory alternative would serve defendant's legitimate interest equally well." Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1283 (Ind. 2008) rehearing denied. Appendix, p. 124.

The Indiana Supreme Court does not compare and balance the impact of the discriminating practice on the protected class and on the community with the detriment to the defendant if the discriminating practice is discontinued. The Association's practice of restricting renters from the subdivision makes unavailable and denies dwellings within the

subdivision to 56% of racial minority householders. The no rent covenant has a manifest relationship to the Association's legitimate, nondiscriminatory interest of protecting property values in that "Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home." Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1284 (Ind. 2008) rehearing denied. On the other hand, so long as the restrictive covenant remains in effect and African American householders rent dwellings, the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States (42 U.S.C. 3601) can never be achieved.

The Indiana Supreme Court does not recognize that there is a legitimate difference between the parties to assert their claims. The Association is a group of 149 private individuals who enforce the restrictive covenant as a means of protecting their property values. McGlothin has a different standing and a different mission.

No person can be prosecuted for an "unlawful act" under the Fair Housing Act. Enforcement of the Fair Housing Act is through civil remedies. This court recognized early on that because HUD has no enforcement powers and because the enormity of the task of assuring fair housing makes the role of the Attorney General minimal. the main generating force must be private suits in which complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that

Congress considered to be of the highest priority." Traffiante v. Metropolitan Life Insurance Company, supra, 211.

In her roll as "private attorney general", McGlothin vindicates the policy of the United States to provide for fair housing. By the Authority of this Court, McGlothin also sues to enforce the rights of the protected class. Gladstone Realtors v. Village of Bellwood, 441 U. S. 91, 103, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979).

In abandoning Arlington Heights, II, supra., as a precedent the Indiana Supreme Court imposes an impossible burden of proof on McGlothin and all other persons in Indiana who may be aggrieved under the FHA as the result of the discriminatory impact of a no-rent covenant. Under the decision, when the defendant asserts the general purpose of all homeowners associations to maintain property values, the burden shifts to the aggrieved person, the victim, to propose that the perpetrator of the unlawful act had an "equally effective, less discriminatory alternative." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1283 (Ind. 2008) rehearing denied.

Please examine the Indiana Court's reasoning:

> "This record does not support a claim under a disparate impact theory. Although the specific property-maintenance covenants are a less discriminatory alternative to promote maintenance, the covenants are not an equally effective means of maintaining

property values. Maintaining property values involves not merely maintaining property but also improving and updating it. Under these covenants, owners are obligated only to maintain the home, not to improve or update it. Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home.

"In a rental situation, however, this incentive is weakened because of divided ownership and occupancy. The renter lacks some incentive to improve the property because he or she would only benefit from the current enjoyment, not from an increased market value. **Because the additional property-maintenance covenants do not address the problem of divided interests in rental property, they are not an equally effective, less discriminatory alternative to excluding renters.** Moreover, although there is nothing in this record directly addressing the point, it seems obvious that an owner-occupant is both psychologically and financially invested in the property to a greater extent than

a renter.[10] Personal motivation can surely achieve better results than contractual compulsion in many cases. This is not a matter of reweighing evidence. Both parties' experts testified that owners maintain property better than do renters. (Tr. at 66, 86, 230-31.) Because the evidence on this point is undisputed, to the extent the trial court found these other covenants equally adequate to maintain property values, the trial court findings on this point are clearly erroneous.

"Because plaintiff points to no equally effective, less discriminatory alternatives to the defendant's legitimate nondiscriminatory policy, that policy does not support a disparate impact FHA violation, even if it has a disparate impact on a protected class." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E.2d 1274, 1284 (Ind. 2008) rehearing denied. (emphasis added) Appendix, p. 126-127.

The Association is exonerated from its unlawful discriminatory conduct unless McGlothin can show that the Association has available an **equally effective,** less discriminatory alternative to

---

[10] Surely, the psychology of this is recognized by prospective purchasers, who assess whether to make purchases based in part on exception that owner-occupant neighbors are likely to make such investments in maintenance.

maintain property values than the no-rent covenant. In examining the alternative covenants for equality, the Indiana Supreme Court divides the interests in the land as the ownership interest and the occupancy interest. The Court then concludes that no separation of the two interests will preserve property values equally as well as when the ownership interest and occupancy interest are held by the same person. The aggrieved person is now saddled with an impossible burden. Considering the risk that the court will award attorney's fees and costs to the offending party under 42 U.S.C. 3613(c)(2), the aggrieved person is foolish to champion the cause of the United States as a "private attorney general."

The Indiana Supreme Court ignores two realities. First, the Association has the power and the duty to enact covenants of its choice which can accomplish its purpose without racial discrimination. Second, there remains in reality the perception gleaned from history that property values are somehow maintained or enhanced because the covenant restricts 53% of Kokomo's African American population from the subdivision.

The Association is an organization of 149 private individuals who own homes in the subdivision. The Association has no power or authority to govern. Chief Justice Shepherd's opinion does not address the conflict of priorities between the purpose of the Association to maintain property values and the policy of the United States to provide for fair housing throughout the United States. 42 U.S.C. 3601.

Court created exceptions to the Fair Housing Act usually involve competing governmental interests

where each of the governing bodies is exercising powers within the scope of its governmental authority. The Arlington Heights II court warns,

> "The third factor which we find to be important is the interest of the defendant in taking the action which produces the discriminatory impact. **If the defendant is a private individual or a group of private individuals seeking to protect private rights, the courts cannot be over solicitous when the effect is to perpetuate segregated housing."** Smith v. Anchor Bldg. Corp., 536 F2d 231 (8th Cir. 1976) as cited in Arlington Heights II, supra., at 1293 (emphasis added).

The Arlington Heights II, supra., court directs the resolution of the conflict in its instructions to the district court on remand.

> "Since the village's zoning powers must give way to the Fair Housing Act, the district court should grant plaintiffs the relief which they request if it finds that the Act has been violated." Arlington Heights II, supra., at 1294.

Certainly, if a municipality's zoning powers to protect property values must give way to the Fair Housing Act, the contractual arrangements of a group of private individuals to protect property values must also give way to the Fair Housing Act. The policy of the United States is stated in the best interest of householders throughout the United States. The

purpose of the Association is stated in the best interests of owners of 149 lots within the subdivision. As the trial court found, "The purposes of the Association must give way to the policy of the United States." Appendix p. 58.

The United States Supreme Court Should Act to Decide Issues and Clarify the Law Pertaining To Disparate Impact Treatment Under the FHA.

The Indiana Supreme Court has decided important questions arising under the FHA that have not, but should be, settled by the U. S. Supreme Court. Justice Rucker emphasizes in his dissenting opinion that a uniform standard for determining liability based on disparate impact remains elusive. He refers to disparate impact jurisprudence as "an increasingly incoherent body of case law". Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1286 (Ind. 2008) rehearing denied. (quoting Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin 841 N.E. 2d 584, 599 (Ind. Ct. App 2006) (quoting Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair and Landing Law, and the Administration Principle, 47 Emory L. J. 409 (Spring 1998).

In referring to the Arlington Heights II, supra., precedent, Justice Rucker says, "Other than to make it exceedingly more difficult for legitimate victims of

housing discrimination to press their claims, I see no reason to abandon the precedent. Indeed, applying the Arlington Heights II factors, both the trial court and the court of appeals concluded that Villas West's restrictive covenant violated the Federal Fair Housing Act because of its disparate impact on members of the African American community residing in the City of Kokomo. I agree and would affirm the judgment of the trial court. Therefore, I dissent." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E.2d 1274, 1286, (Ind. 2008) rehearing denied.

It is time for the United States Supreme Court to revisit the Fair Housing Act and give guidance to a uniform methodology in disparate impact and discriminatory impact cases.

CONCLUSION

The Association's enforcement of a restrictive covenant preventing renting makes unavailable and denies dwellings within the subdivision to 56% of all racial minority householders in Kokomo, thereby perpetuating segregation and preventing interracial association. The covenant is invidious under the Fair Housing Act and must be declared void.

Imposing upon McGlothin the burden of proving an "equally effective less discriminatory alternative" to the no-rent covenant in protecting property values is unreasonable. The Association and its members violated the law. The Association and its members have the duty to act within the law. The harm is the denial of housing to a protected class because of race.

The harm to the protected class is the ongoing discriminatory impact which enforcement of the restrictive covenant has on the protected class and the Kokomo community.

The purpose of the Association to protect property values by a practice which restricts 56% of all minority householders from the subdivision can not take precedence over the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

For the reasons stated in this Petition, Appellant Shirley A. Ashcraft, Personal Representative of the Estate of Edna McGlothin, deceased, asks the Supreme Court of the United States to issue a writ of certiorari to the Indiana Supreme Court and, upon review, reverse the decision of the Indiana Supreme Court in this cause.

Respectfully submitted,

Joseph Henry Davis, Jr.
Counsel of Record for Shirley
A. Ashcraft, Personal
Representative of the Estate
of Edna McGlothin, deceased,
Petitioner

Supreme Court, U.S.
FILED
08-817 DEC 23 2008
OFFICE OF THE CLERK

115

No.

IN THE

SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ASHCRAFT,
As Personal Representative
of the Estate of Edna P.
McGlothin, Deceased

Petitioner

v.

VILLAS WEST II OF
WILLOWRIDGE HOMEOWNERS
ASSOCIATION, INC.

Respondent

On Petition For Writ Of Certiorari
To The Indiana Supreme Court

APPENDIX

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STATE OF INDIANA	)	IN THE HOWARD
	) SS:	SUPERIOR COURT
COUNTY OF HOWARD	)	
		CAUSE NO.
VILLAS WEST II OF WILLOWRIDGE HOMEOWNERS ASSOCIATION, INC.,	)	34D02-0210-PL-893
Plaintiff	)	FILED
	)	OCT. 10, 2002
vs.	)	LINDA KOONTZ
	)	Clerk, Howard
EDNA McGLOTHIN,	)	Superior Court,
	)	Division II
Defendant.	)	

COMPLAINT

Comes now the Plaintiff, Villas West II of Willowridge Homeowners Association, Inc., by counsel, and for its cause of action against the Defendant, Edna McGlothin, alleges and states as follows:

1. That at all times herein the Plaintiff was a corporation with its principal place of business located in the City of Kokomo, County of Howard, State of Indiana;
2. That at all times herein the Defendant, Edna McGlothin, resided at, or owned real property at, 513 Delray Street, in the City of Kokomo,

Indiana;

3. That the Defendant's real property is located in the Villas West II Subdivision;
4. That the Defendant's real property is subject to certain covenants, conditions, and restrictions as evidenced by the amended declaration recorded on April 2, 1992, and attached hereto as Exhibit "A";
5. That Plaintiff has reason to believe that beginning on or about September 1, 2002, and continuing through the present, the Defendant, or her agent, has leased, rented, or otherwise allowed the use of her real property by a non-family member in violation of the recorded covenants, specifically Article 9, Section 4(b), which provides that the lease of a dwelling by an owner shall not be allowed;
6. That Article 9, Section 3 provides the Plaintiff with the right to seek injunctive relief for any violation of the aforementioned provisions and damages from the same;
7. That the Plaintiff has given prior notice of its request to correct the violation and has attempted to resolve this dispute without resorting to legal action without success and has, therefore, had to retain counsel and has incurred legal expenses. (A copy of the letter to the Defendant's children is attached hereto as Exhibit "B");

WHEREFORE, the Plaintiff, Villas West II of Willowridge Homeowner's Association, Inc., respectfully prays the Court issue an injunction prohibiting the Defendant from renting, leasing, or otherwise allowing non-family members to occupy the

real property located at 513 Delray Street, for an Order requiring the Defendant to remove the current tenant, for the costs of this action, for attorney fees in the amount not less than one thousand dollars ($1,000.00), and for all other just and proper relief in the premises.

KING, McCANN & SCOTT, LLP

S/Jeremy A. Peelle
Jeremy A. Peelle
Attorney for Plaintiff

KING, McCANN & SCOTT, LLP
122 N. MAIN ST., P.O. BOX 805
KOKOMO, IN 46903-0805
765-459-0751

EXHIBIT A 004480 80 0458

AN AMENDED DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR VILLAS WEST II PLANNED UNIT DEVELOPMENT WILLOWRIDGE SUBDIVISION

THIS DECLARATION, made on the date hereinafter set forth by JIM BAGLEY CONSTRUCTION COMPANY, INC., hereinafter called "Declarant," is made pursuant to AN AFFIRMATION OF AUTHORITY duly executed by BAGKO DEVELOPMENT COMPANY and recorded November 13, 1990 at Record 78, page 1088 in the

records of the Recorder of Howard County, Indiana; it is made pursuant to a re-plat of said Section II approved by the Kokomo City Plan Commission March 10, 1992 and thereafter duly recorded on March 23, 1992 in Record 9, page 376 of the Howard County Recorder.

WITNESSETH:

WHEREAS, Declarant is A General Partner of the owner of certain real estate in Kokomo, County of Howard, State of Indiana, which is more particularly described on Exhibit "A", attached hereto and made a part hereof, the real estate described on Exhibit "A" is hereinafter called Villas West II of Willowridge Subdivision Planned Unit Development.

WHEREAS, the Declarant intends to develop the Properties by subdividing the Properties into "Clusters" that are to be used for residential purposes and will contain maintenance easements to, on and across the Properties that will be owned by a homeowners association to which the owner of a dwelling in the Properties must belong and pay lien-supported maintenance assessments, and

WHEREAS, the Declarant, by this Declaration intends to subdivide each Cluster into "Lots" for residential use, which Clusters are more particularly illustrated on the plat of properties marked Exhibit "B", attached hereto and made a part hereof, and

WHEREAS, prior to the conveyance of the first Lot to an owner, the Declarant intends to convey certain maintenance easements prescribed on Exhibit "C" to, on and across the Properties, to the Association for the use and enjoyment of the Association for the benefit of the owners (Subject to

the terms of this Declaration); and which easements are intended to enable the Association to carry out its obligation under this Declaration.

NOW, THEREFORE, Declarant hereby declares that all of the real estate described on Exhibit "A" shall be held, sold and conveyed subject to the following maintenance easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real estate and be binding on all parties having any right, title or interest in the described Properties or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each Owner thereof.

RECEIVED FOR RECORD
AT 9:05 A.M. O'CLOCK
APR - 2 1992
RECORD NO. 80 PAGE 0458
s/Jane Schrader
RECORDER OF HOWARD
COUNTY, INDIANA

ARTICLE I
DEFINITIONS

Section 1. "Declarant" shall mean and refer to Jim Bagley Construction Company, Inc., its successors and assigns as a Declarant.

Section 2. "Association" shall mean and refer to Villas West II of Willowridge Homeowners Association, Inc., its successors and assigns.

Section 3. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of a fee simple title to any Lot which is a

part of the properties, including contract purchaser, but excluding those having such interest merely as security for the performance of an obligation.

Section 4. "Properties" shall mean and refer to the certain real estate described on Exhibit "A", which consists of 52 Cluster Lots and streets, sewers, water lines and other facilities all of which are or will be dedicated to the City of Kokomo, Indiana.

Section 5. "Cluster" shall mean a subdivided Lot as approved by the City of Kokomo, Indiana as more particularly illustrated on Exhibit "B". A Cluster includes two (2) or more Lots (as defined herein) and two (2) or more Dwellings per Cluster.

Section 6. "Lot" shall mean and refer to the subdivision of Cluster shown upon any recorded subdivision map of the Cluster. Declarant has planned two (2) or more Lots per Cluster.

Section 7. "Dwelling" shall mean and refer to a single family residence erected on a Lot or a Cluster and shall be used by the owner or a contract purchaser, and his immediate family.

Section 8. "Maintenance Easement" shall mean the easements owned by the Association to be used for the benefit of the Owners to enable the Association to carry out its obligations under this Declaration, which easement is more particularly described in Exhibit "C".

Section 9. "Declaration" shall mean and refer to the Declaration of Covenants, Conditions and Restrictions of Villas West II of Willowridge Subdivision, applicable to Properties, recorded in the Office of the Howard County Recorder, Kokomo, Indiana.

Section 10. "Exhibit" shall be an Exhibit attached to the Declaration.

ARTICLE II
PROPERTY RIGHTS

Section 1. Association Easements of Use. This Association shall have all rights in and to the Maintenance Easements which shall be a covenant running with the land and to the Association. The title to every Lot shall be subject to the Maintenance Easements. The Association shall have, among other rights granted it under this Declaration, the right to:

(a) use the Maintenance Easements for the benefit of the Owner;

(b) suspend the voting rights of an Owner for any period during which any assessment against his Lot remains unpaid; and for a period not to exceed sixty (60) days for any infraction of the Association's published rules and regulations.

Section 2. Property Subject to Declaration. The Properties which are, and shall be, held, conveyed, hypothecated or encumbered, sold, leased, rented, used, occupied and improved subject to this Declaration are located in Howard County, State of Indiana, and are more particularly described on Exhibit "A" attached hereto and by this reference made a part hereof.

Section 3. Title to Maintenance Easements. The Declarant shall convey the Maintenance Easements to the Association, at the time of the first conveyance of a Lot, such conveyance to be subject to taxes for the year of conveyance, and to restrictions, conditions, limitations and easements of record.

ARTICLE III
MEMBERSHIP AND VOTING RIGHTS

Section 1. Every Owner of a Lot which is subject to an assessment, as defined in Article IV, Section 1, shall be a Member of the Association. For purposes of determining classes of membership, a Class A Member shall be the Owner of any conveyed Lot, and each reference to a Lot in Section 2 (a), or 2 (b) of this Article shall be deemed to be a conveyed Lot containing a Dwelling, and a Class B Member shall be the Owner of any unconveyed Lot, and each reference to a Lot in Section 2 (a), or 2 (b) of this Article shall be deemed to be a conveyed Lot containing a Dwelling or an unconveyed Lot, respectively.

Section 2. The Association shall have two (2) classes of Membership and until such time that the Villas West II of Willowridge Homeowner's Association, Inc. has Sixty-Eight (68) Class A Members, the affairs of the Association shall be managed by a Board of Directors, comprised of Four (4) members, appointed by the Declarant.

As soon as practical after Sixty-Eight (68) Class A Members are in the Association, said Board of Directors shall call a meeting of all members to elect Officers to manage the Association's affairs, as hereinafter set forth in the "Code-Of-Bylaws" Article IV.

After said election of Officers, the Declarant, however, shall have full authority as to the style and construction and sales price of all homes on the Lots remaining to be built upon and will be subject to sign regulations and maintenance cost as stated

elsewhere in this Document.

(a) Class A. Every person, group of persons or entity, other than the Declarant, who is a record Owner of a fee interest in any Lot which is or becomes subject, by covenants or record, to assessment by the Association, shall automatically be a Class A Member of the Association; provided, however, that any such person, group of persons or entity who holds such interest solely as security for the performance of an obligation shall not be a Member, until and unless he shall become an Owner through completed foreclosure of his security and acquiration of title. A Class A membership shall be appurtenant to and may not be separated from ownership of any Lot which is subject to assessment. Class A Members shall be entitled to One (1) vote for each Lot in which they hold the interest required for membership. In the event that more than one person, group of persons or entity is the record Owner of a fee interest in any Lot, then the vote for the membership appurtenant to such Lot shall be exercised as they among themselves determine, but in no event shall more than One (1) vote be case with respect to any Lot.

(b) Class B. The Class B Member shall be the Declarant and those designated in writing by the Declarant and shall be entitled to Ten (10) votes for each Lot owned. The Class B Membership shall cease and be converted to a Class A membership on the happening of either of the following events, which ever occurs earlier:

(i) whenever the total votes outstanding of Class A Membership equal the total votes outstanding in

Class B Membership,

(ii) on April 15, 2000, in the event all the Lots have not been conveyed to the Owners or the Class B Memberships have not been surrendered by the then holders thereof for cancellation on the books of the Association.

ARTICLE IV
COVENANT FOR ANNUAL AND SPECIAL ASSESSMENTS

Section 1. Creation of the Lien and Personal Obligation of Assessments. Each owner of any Tract by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to; pay to the Association (1) annual assessments or charges, including assessment to establish and maintain a replacement reserve fund, as provided for by the Board of Directors of the Association, and (2) special assessments for capital improvements, such assessment to be established and collected as hereinafter provided. At the date of this Declaration, there shall be deemed to be 122 Tracts within the Properties for the purposes of determining the total number of assessments payable by Members.

Section 2. Purpose of Assessments. The assessments levied by the Association on a Lot shall be used exclusively to promote the recreation, health, safety and welfare of the residents in the Properties and for such improvements and maintenance on the Properties, as required under Article V of this Declaration.

Section 3. Date of Commencement of Annual

Assessments: Due Dates. The annual assessments for a Lot owned by a Class A Member shall commence on the first day of the month following the initial conveyance of a Lot to a Class A Member by the Declarant. The first annual Assessment shall be adjusted according to the number of months remaining in the calendar year. The Board of Directors shall fix the amount of the annual assessment for Class A Members against each Lot at least Thirty (30) days in advance of each annual assessment period. If any change has been made to said annual assessment, written notice of the annual assessment for Class A Members shall be sent to every Owner subject thereto. The due dates shall be established by the Board of Directors. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by an officer of the Association setting forth whether the assessments on a specified Lot have been paid. A properly executed certificate of the Association as to the status of assessment on a Lot is binding upon the Association on the date of its issuance.

Section 4. Rates of Assessment. Both annual and special assessments for Class A Member shall be levied on each Lot on an equal basis.

(a) Initially each one family attached duplex unit shall have a monthly assessment of Seventy-Five Dollars ($75.00).

(b) The Declarant shall not be subject to monthly assessment for homes under construction or completed homes that are for sale. Declarant will however pay all cost to maintain said homes including lawn care, snow removal, etc. on a prorated

basis until sold.

As a conveyance to the Association, assessment may be collected on a monthly or other convenient basis.

Section 5. Maximum Annual Assessment. The Board of Directors may increase the annual assessment per Lot by the assent of Two-Thirds (2/3) of the votes of Members who are voting in person or by proxy at a meeting duly called for the purpose.

Section 6. Special Assessments for Capital Improvements. In addition to the annual assessments authorized above, the Association may levy, in any assessment year, a special assessment applicable that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the lots including fixtures, landscaping and personal property related thereto, provided that any such assessment shall have the assent of Two-Thirds (2/3) of the votes of each class of members who are voting in person or by proxy at a meeting duly called for this purpose.

Section 7. Notice and Quorum for any Action Authorized under Sections 5 and 6. Written notice of any meeting called for the purpose of taking any action authorized under Section 5 or 6 shall be sent to all Class A and Class B Members not less than Thirty (30) days nor more than Sixty (60) days in advance of the meeting. At the first such meeting called, the presence of Class A and Class B Members or of proxies entitled to cast Sixty Percent (60%) of all the votes of the Class A and B Membership shall constitute a quorum. If the required quorum is not

present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be One-Half (½) of the required quorum at the preceding meeting. No such subsequent meeting shall be held more than Sixty (60) days following the preceding meeting.

Section 8. Effect of Nonpayment of Assessments: Remedies of the Association. Any assessment for a Class A Membership not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of Fifteen Percent (15%) per annum. The Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the Lot. No Owner may waiver or otherwise escape liability for the assessment provided for herein by non-use of the Common Area or abandonment of his Lot. The personal obligation for delinquent assessment shall pass to his successors in title.

Section 9. Subordination of the Lien to Mortgages. The lien of the assessments provided for in this Article shall be subordinate to lien of any first mortgage. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.

ARTICLE V
MAINTENANCE AND OTHER EXPENSES

Section 1. Exterior Maintenance. The Association shall provide exterior maintenance (caused by normal depreciation) upon each Lot which is subject to assessment hereunder, as follows: paint, repair, replacement and care of the following: roofs, gutters, fences, downspouts, exterior building surfaces, trees, shrub, grass, walks, driveways, other exterior improvements and removal of snow from walks and driveways located on the Lots; provided, however, the Association shall have the discretion to determine the priority and necessity for such exterior maintenance. Such exterior maintenance shall not include replacement or repairs to glass surfaces, screens or window fixtures; door hardware and locks. In the event the need for maintenance or repair of a Lot or the improvements thereon is caused through the willful or negligent act of the family, quests or invitees of the Lot needing such maintenance or repair, the cost of such exterior maintenance shall be added to and become a part of the assessment to which such Lot is subject. Any loss, casualty or otherwise, to a Dwelling, other than normal depreciation, shall be repaired or replaced at Owner's sole expense or from insurance proceeds, if applicable.

Section 2. Maintenance by Dwelling Owner. Except as otherwise provided in Article V, Section 1 above, each Dwelling Owner shall furnish and be responsible for, at his own expense, all maintenance, repairs and replacement within his own Dwelling, including the doors, glass surface, screens, window

fixtures and patios, and all installations such as refrigerators, ranges, and or kitchen appliances, lighting fixtures and other electrical fixtures, plumbing fixtures or installations and any pipes, ducts, flues, shafts, electrical wiring and conduits and individual heating, cooling, and ventilating systems or equipment situated within or servicing the Dwelling only, commencing at a point where such installations enter the exterior walls of the Dwelling; walls constituting party walls or interior walls. Maintenance, repairs and replacements as may be required for the bringing of water, gas and electricity to the exterior walls of the Dwelling, shall be furnished by the Association as part of the common expenses. Each owner shall promptly perform all maintenance and repair in his Dwelling which, if neglected, might adversely affect any other Dwelling, Common Area or the value of the Property.

Section 2-A. Each home owner will be responsible for watering their own lawns and shrubs. Each home owner has the option to have installed a lawn sprinkler system and shall pay all cost to install, maintain and cost of water.

Section 3. Common Area Maintenance. The Association, at its expense, shall be responsible for the maintenance, repair, replacement and general upkeep of the Common Area.

Section 4. Real Estate Taxes. Real estate taxes are to be separately assessed and taxed to each Lot. Any real estate taxes or other assessments which are chargeable against the Common Area shall be paid by the Association and treated as a Common Expense.

Section 5. Utilities. Each Owner shall pay for his own utilities which are separately metered. Utilities which are not separately metered shall be treated as and paid as part of the Common Expense unless otherwise determined by the Association.

Section 6. Casualty and Restoration. In the event of damage or destruction of any Dwelling by fire or other casualty, the Owner thereof shall cause such Dwelling to be promptly repaired and restored. The proceeds of insurance carried for the benefit of the Association, Owner and Owner's Mortgagee for such purpose shall be applied to the cost of such restoration. In the event insurance proceeds are inadequate to cover the cost of such reconstruction or in the event there are no proceeds, the Owner or Owners of the Dwelling directly affected by the damage shall pay the cost for restoring the Dwelling. A Dwelling shall be deemed directly affected if and only if a part of such Dwelling, including but not limited to, any party wall of such Dwelling, is damaged or destroyed. If any Owner fails or refuses to reconstruct his Dwelling when required, the Association may pursue whatever legal means are available to cause such restoration, including but not limited to the Association completing the restoration and paying the cost thereof, with the cost attributable to the Owner or Owners who refuse or fail to make the restoration when required becoming a lien on such defaulting Owner's Dwelling and subject to foreclosure in the same manner as provided for a Common Expense.

The restoration referred to in this Section 6 shall mean reconstruction or rebuilding of the Dwelling in

the same condition as existed immediately prior to the destruction or damage and with the same type of architecture. Notwithstanding any other provisions in this declaration of dwellings which are destroyed or damaged shall be restored pursuant to the provision of this paragraph, unless a majority vote of the Members of the Association decided that such restoration is not necessary, and all improvements in the Common Area which are damaged or destroyed shall be restored by the Association unless Two-Thirds (2/3) of the Members of the Association and Two-Thirds (2/3) of all first Mortgagees decide not to make such restoration or to make such restoration in a different manner.

In the event the Association has insurance proceeds which are to be used for the benefit of the Owners, no distribution of such insurance proceeds shall be made by the Board of Directors directly to an Owner where there is a mortgagee endorsement on the certificate of insurance or insurance policy as it applies to such Owner's share of such proceeds. In such event any remittances shall be to the Owner and his Mortgagee jointly. The same method of distribution shall also apply to the distribution of any condemnation award in connection with any taking of any of the Common Area.

ARTICLE VI
Pparty WALLS

Section 1. General Rules of Law to Apply. Each wall which is built as a part of the original construction of the Dwelling upon the Properties and placed on the dividing line between the Lots shall

constitute a party wall, to; the extent not inconsistent with the provisions of this Article, the general rules of law of the State of Indiana regarding party walls and liability for property damage due to negligence of willful acts or omissions shall apply thereto.

Section 2. Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of a party wall shall be shared by the Owners who make use of the wall in proportion to such use.

Section 3. Destruction by Fire or Other Casualty. If a party wall is destroyed or damaged by fire or other casualty, any Owner who has used the wall may restore it, and if the other Owners thereafter make use of the wall, they shall contribute to the cost of restoration thereof in proportion to such use without prejudice, however, to the right of any such Owners to call for a larger contribution from the others under the rule of law regarding liability for negligent or willful acts or omissions.

Section 4. Weatherproofing. Notwithstanding any other provisions of this article, an Owner who by his negligent or willful act causes the party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

Section 5. Right to Contribute Runs With Land. The right of any Owner to a contribution from any other Owner under the Articles shall be appurtenant to the land and shall pass to such Owner's successors in title.

Section 6. Arbitration. In the event of any dispute arising concerning a party wall, or under the provisions of this Article, each party shall choose one

arbitrator, and such arbitrators shall choose one additional arbitrator, and the decision shall be by a majority of all the arbitrators.

ARTICLE VII
GENERAL PROVISIONS

Section 1. Enforcement. These covenants, conditions and restrictions may be enforced by the Association or any Owner. Enforcement of these covenants, conditions and restrictions shall be by any proceeding at law or in equity against any person or persons violating or attempting to violate any covenant, condition or restriction, either to restrain or enjoin violation or to recover damages, and against the land to enforce any lien created by these covenants; and the failure or forbearance by the Association or any Owner to enforce any covenant, condition or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. There shall be and there is hereby created and declared to be conclusive presumption that any violation or breach of or any attempted violation or breach of any of the within covenants, conditions or restrictions cannot be adequately remedied by action at law or by recovery of damages.

Section 2. Severability. Invalidation of any one of these covenants, conditions or restrictions by judgment or court order shall in no way affect any other provision which shall remain in full force and effect.

Section 3. Duration. Except where permanent easements or other permanent rights or interests are herein created, the covenants and restrictions of this

declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, or the Owner of any Lot subject to this Declaration, their respective legal representatives, heirs, successors, and assigns, for a term of Twenty (20) years from the date or recordation of this Declaration, after which the said covenants shall be automatically extended for successive periods of Ten (10) years each.

Section 4. Amendment. This Declaration may be amended during the first Twenty (20) year period by an instrument signed by not less than Eighty Percent (80%) of the Lot Owners, and thereafter by an instrument signed by not less than Sixty-six and Two-thirds Percent (66-2/3%) of the Lot Owners. Any amendment must be recorded in the office of the Recorder of Howard County, Indiana. No such agreement to amend, in whole or in part, shall be effective unless made and recorded Six (6) months in advance of the effective date of such amendment, and unless written notice of the proposed agreement is sent to very Owner at least Ninety (90) days in advance of any action taken and no such agreement shall be effective with respect to any permanent easements or other permanent rights or interest relating to the common easement herein created. Any objections based upon failure to receive notice of the proposed agreement must be raised within the Six (6) month period following recordation.

ARTICLE VIII
MORTGAGEE'S RIGHTS

Section 1. Notice of Rights of Mortgagee of a Lot.

Upon written request by a mortgagee to the Association, mortgagee of a Lot shall be entitled to receive written notification of any default, not cured within Sixty (60) days after its occurrence, by the Owner of the Lot of any obligation of the Owner under the Declaration, the By-Laws of the Association or the Articles of Incorporation of the Association. The request for notification can be made by any mortgagee of a Lot, its successor or assign. The notification shall be sent not later than the 65th day after the occurrence of an uncured default.

Section 2. Rights of First Refusal. No first mortgagee, its successor or assign, of a Lot who; comes into possession of that Lot pursuant to the remedies provided in the mortgage, foreclosure of the mortgage, a deed or assignment taken in lieu of foreclosure shall be subject to any rights of first refusal which the Owner may have given to the Association or other Owners of the Lots.

Section 3. Rights of Mortgagee. Unless at least Eighty Percent (80%) of the first mortgagees (based upon one vote for each first mortgage owned), or the Class A Members have given their prior written approval, the Association shall not:

(a) by act or omission seek to abandon, partition, subdivide, encumber, sell or transfer the Properties or Common Easement or improvements located thereon which are owned directly or indirectly by the Association for the benefit of the Lots. The granting of easements for public utilities or for other public purposes consistent with the intended use of the Properties by the Association shall not be deemed a transfer within the meaning of this clause.

(b) change the method of determining the obligations, assessments, dues or other charges which may be levied against a Lot or Owner.

(c) by act or omission change, waive or abandon any scheme or regulation or enforcement thereof pertaining to the architectural design or exterior appearance of the Lots, the exterior maintenance of the Lots, the maintenance of the party walls or common fences, driveways or the upkeep of lawns and plantings in the properties.

(d) fail to maintain fire and extended coverage insurance on insurable common property on current replacement cost basis in the amount not less than One Hundred Percent (100%) of the insurable value (based on current replacement cost).

(e) use hazard insurance proceeds for losses to any property for other than repair, replacement or construction of such improvements.

Section 4. Rights to Examine Books and Records. Mortgagees, their successors or assigns, shall have the right to examine the books and records of the Association.

Section 5. Condemnation. No Owner or any other person shall have priority of any rights of mortgagees of the Lots of insurance proceeds or condemnation awards for losses to or taking of the Common Easements.

ARTICLE IX
HARMONY AND ENVIRONMENTAL CONTROLS

Section 1. Architectural Control Committee. Except for original construction or as otherwise provided herein, no building, fence, drive, walk, other

structures, vegetation or landscaping shall be erected, placed, altered, maintained or planted upon the Properties nor shall any exterior addition to or change (including any change in color) or alteration therein be made until the proposed building plans, specifications, exterior color and finish, plot plans (showing the proposed location of such building or structure, drives and parking areas), general contractor and all subcontractors and construction schedule shall have been submitted to and approved in writing by the Board of Directors of the Association, or by any architectural control committee composed of not less than three (3) members appointed by said Board of Directors. Refusal of approval of plans, location or specifications by said Board of Directors or architectural control committee may be based upon any ground, including, without limitation, lack of harmony of external design, color, location or relation to surrounding structures and topography and purely aesthetic considerations which, in the sole and uncontrolled discretion of said Board of Directors or architectural control committee shall be deemed sufficient. No alterations may be made in such plans after approval by the Board of Directors or Architectural Control Committee is given except by and with their prior written consent. One copy of all plans, specifications and related data shall be furnished for the Board of Directors or architectural control committee for its records.

Section 2. Fences. Except for original construction, no fence, hedges or wall shall be constructed upon the Properties without the prior

written approval of the architectural control committee.

Section 3. Prohibited Uses and Nuisances. Except for the activities of the Declarant during original construction the following covenants and restrictions on the use and enjoyment of the Lots, Common Area and Properties are for the mutual benefit and protection of the present and future Owners and shall run with the land and inure to the benefit of and enforceable by any Owner, by the Association, its successors and assigns. Present or future Owners of the Association shall be entitled to injunctive relief against any violation or attempted violation of these provisions and shall be entitled to damages for any injuries resulting from any violations thereof, but there shall be no right of reversion or forfeiture of title resulting from such violation:

(a) no noxious or offensive trade or activity shall be carried out upon any Lot or within any Dwelling situated upon a Lot, nor shall anything be done therein or thereon which may be or become an annoyance or nuisance to the neighborhood or the other Owners of the Lots.

(b) the maintenance, keeping, boarding and/or raising of animals, livestock or poultry of any kind, regardless of number, shall be and is hereby prohibited on any Lot or within any dwelling situated upon the Properties, except that this shall not prohibit the keeping of dogs, cat and/or caged birds as domestic pets provided they are not kept, bred or maintained for commercial purposes. Said household pets shall not be housed outside or allowed to run

loose.

(c) no burning of any trash and no accumulation or storage or litter, new or used building materials, or trash of any kind shall be permitted on any Lot, except during construction of Units by Declarant.

(d) except as otherwise provided, no junk vehicle, commercial vehicle, trailer, trust, camper, snow vehicle, camper truck, house trailer, boat or the like, shall be kept upon the Properties nor (except for bona-fide emergencies) shall the repair or extraordinary maintenance of automobiles or other vehicles be carried out thereon.

(e) trash and garbage containers shall not be permitted to remain in public view except on days of trash collection.

(f) no trees or shrubs shall be removed from any portion of the Properties without written approval of the Association acting through its Board of Director or duly appointed committee.

(g) except as may be approved in writing by the Board of Directors or their designated committee, no structure of a temporary character, trailer, tent, shack, barn or other out-building shall be used on any portion of the property at any time.

(h) except for entrance signs, directional signs, community "theme" and the like, no signs of any character shall be erected, posted or displayed upon, in or about any Lot situated upon the Properties, provided, however, if specifically permitted by a written regulation adopted by the Board of Directors. Declarant may use for sale, directional, open house, office or other signs during construction and development of Villas West II Planned Unit

Development Willowridge Subdivision.

(i) no structure, planting or other material other than driveways or sidewalks shall be placed or permitted to remain upon any portion of the Properties which may damage or interfere with any easement for the installation or maintenance of utilities or which may change, obstruct or retard direction or flow of any drainage channels or swales.

(j) garage doors and the doors of any other storage room or the like shall be maintained in a closed position whenever possible.

(k) no outside television or radio aerial or antenna, or other aerial or antenna, for reception or transmission shall be maintained upon any Lot without the prior written consent of the Board of Directors. Owners shall have access to cable TV and shall pay for same.

(l) there shall be no violation of any rules which may from time to time be adopted by the Board of Directors or promulgated among the Membership by them in writing, and the Board of Directors is hereby and elsewhere in the By-Laws, authorized to adopt such rules.

(m) in addition to the foregoing restrictions, all restrictions of the Plat as to the use of the Properties are incorporated by reference herein as restrictions of this Declaration.

(n) no construction, other, than original construction, or replacement of original construction as approved by the Board of Directors, on the Lot shall be permitted.

Section 4. Right of Association to Remove or Correct Violations of This Article. The Association

may, in the interest of the general welfare of all the Owners of the Lots and after reasonable notice to the Owner, enter upon any Lot or the exterior of any Dwelling at reasonable hours on any day except Sunday for the purpose of removing or correcting any violations or breach of any attempted violation of any of the covenants and restrictions contained in this Article, or for the purpose of abating anything herein defined as a prohibited use or nuisance, provided, however, that no such actions shall be taken without a resolution of the Board of Directors of the Association or by an architectural control committee composed of Three (3) or more Members appointed by the Board.

(a) Perpetual Easement for Encroachments. If any Lot or any improvements of whatever type shall for any reason encroach upon any other Lot or upon any portion of the Common Easement as a result of the construction of the building or improvements, or as a result of settling or shifting of the building or improvements or for any other reason, the boundary lines shall be deemed to be treated for purposes of occupancy, possession, maintenance, use and enjoyment, as in accordance with the actual existing construction and, a valid, perpetual easement for the encroachment and for its maintenance is retained by the Declarant for its benefit and for the benefit of the Association and any Owner of a Lot whose Lot is affected thereby and shall exist perpetually. In the event the building or the improvement shall be partially or totally destroyed as a result of fire or other casualty or as a result of condemnation or eminent domain proceedings, and a valid easement

for such encroachment is hereby reserved by the Declarant for its benefit and for the benefit of the Association and any Owner of a Lot whose Lot is affected thereby and shall exist perpetually.

(b) Lease of Dwelling by Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family.

(c) Right of Board of Directors to Adopt Rules and Regulations. The Board of Directors may promulgate such additional rules and regulations regarding the operation of the Property, including but not limited to the use of the Common Area, patios, and other areas not covered by the Dwelling, as it may deem necessary from time to time. Such rules as are adopted may be amended by vote of a majority of the Board, and the Board shall cause copies of such rules to be delivered and mailed promptly to all Owners.

ARTICLE X
INSURANCE

Section 1. Association's Requirements. The Association shall purchase broad form Comprehensive Liability coverage in such amounts and in such forms as the Board of Directors shall deem appropriate. Such coverage shall be issued in the name of the Association and shall include each Owner in their capacity as Members of the Association as additional insured and evidence thereof shall be furnished to each additional insured.

Coverage under this policy shall include, but not be limited to, legal liability of the Association for bodily and personal injuries, property damages, operation of motor vehicle on behalf of the Association and operations and maintenance as may be required under this Declaration.

Section 2. Owners' Requirements. Each Owner, and not the Association, shall have the responsibility of obtaining and keeping in full force and effect, at his sole expense on his Dwelling and Lot, standard fire and extended coverage insurance to assure full replacement thereof and broad form Comprehensive Liability Insurance.

Section 3. All Dwelling Units Insured by One Company. Each Owner shall be required to purchase insurance on its Dwelling and Lot from the same company. The company is now John L. Kiley Agency, Inc., 420 North Main Street, Kokomo, Indiana 46901. The Board of Directors may select bids on insurance from various companies and change the insurance company if approved by a majority of the Class A Members of the Home Owners Association.

Any loss, casualty or otherwise, to a Dwelling, other than normal depreciation, shall be repaired or replaced at Owners sole expense or from insurance proceeds, if applicable.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has hereunto set its hand and seal this 1st day of April, 1992.

JIM BAGLEY CONSTRUCTION COMPANY, INC.

By: s/ James B. Bagley, Jr.
James B. Bagley, Jr., President

STATE OF INDIANA)
)
COUNTY OF HOWARD)

Before me, a Notary Public in and for said County and State, personally appeared James B. Bagley Jr., President, who acknowledged the execution of this foregoing Amended Declaration of Covenants, Conditions and Restrictions for Villas West II Planned Unit Development Willowridge Subdivision, and who having been duly sworn, state that the representations contained herein are true.

WITNESS my hand and seal this 1st day of April, 1992.

s/ Ralph L. Helms
Notary Public: Ralph L. Helms

My Commission Expires:
10-15-95

This instrument prepared by Ralph L. Helms, Attorney at Law, 116 North Main Street, Kokomo, Indiana 46901.

COUNTY OF RESIDENCE OF
NOTARY HOWARD T.K.

NOW THEREFOR, the undersigned declarants hereby declare that S. Sec. K, of Sec 3, Article IX page 15 is hereby amended to read as follows:

"(K) with the exception of Satellite TV receivers which are installed in the rear yard of or on the rear roofs of houses built in this subdivision and which do not exceed 24 inches in diameter, no outside television or radio antennas shall be permitted in this subdivision without the written consent of the Board of Directors. Owners shall have access to Cable TV and shall pay the cost of same."

This amendment shall take effect upon its signature by Declarant and its being recorded in the records of the Howard County Recorder.

Executed this 2nd day of March, 1995.

JIM BAGLEY CONSTRUCTION CO. INC.

s/ James B. Bagley, Jr.

President

STATE OF INDIANA

COUNTY OF HOWARD

Before me a Notary Public in and for said County and State came James B. Bagley, Jr. this 2nd day of March, 1995 who acknowledged the execution of the above and foregoing instrument to be his free and voluntary act for the purposes therein set out.

s/ Ralph L. Helms

Ralph L. Helms, Notary Public

Resident Howard County

My Commission Expires:

10-15-95

EXHIBIT "A"

ATTACHED TO DECLARATIONS OF COVENANTS, CONDITIONS AND RESTRICTIONS OF VILLAS WEST II PLANNED UNIT DEVELOPMENT WILLOWRIDGE SUBDIVISION.

LEGAL DESCRIPTION

A part of the Southwest Quarter of Section 34,

Township 24 North, Range 3 East in Center Township, Howard County, Indiana: as follows: Commencing at a point North 89 degrees, 04 minutes, 31 seconds East (assumed bearing) 913.90 feet from the Southwest corner of the North half of the Southwest quarter of Section 34, Township 24 North, range 3 East, said point being the point of beginning of this description; thence North 00 degrees, 00 minutes, 00 seconds 1320.60 feet to the North line of the Southwest quarter of said Section 34; thence North 89 degrees, 01 minutes, 46 seconds East 1066.03 feet along the North line of said Southwest quarter to the Northwest corner of Western Woods Subdivision Section IV to the City of Kokomo as recorded in Plat Book 9, Page 80, Records of Howard County, Indiana; thence South 00 degrees, 02 minutes, 00 seconds West 1321.47 feet along the West line of said Western Woods Subdivision Section IV to the Southwest corner of said Western Woods Subdivision Section IV; thence continue South 00 degrees, 02 minutes, 00 seconds West 183.28 feet; thence South 90 degrees, 00 minutes, 00 seconds West 1035.00 feet; thence North 00 degrees, 00 minutes, 00 seconds 30.00 feet; thence North 90 degrees, 00 minutes, 00 seconds West 30.00 feet; thence North 00 degrees, 00 minutes, 00 seconds 136.09 feet to the point of beginning containing 36.563 acres, more or less, and subject to all legal rights of way and easements of record.

EXHIBIT "C"

ATTACHED TO DECLARATIONS OF COVENANTS, CONDITIONS AND RESTRICTIONS OF VILLAS WEST II PLANNED UNIT DEVELOPMENT OF WILLOWRIDGE SUBDIVISION

MAINTENANCE EASEMENTS

The right of ingress and egress to and across all Lots, located on the Real Estate described on Exhibit "A" attached to the Declaration of Covenants, Conditions and Restrictions of Villas West II Planned Unit Development of Willowridge Subdivision, (hereinafter called "Declaration") in the Office of the Recorder of Howard County, Indiana, as Instrument No. Plat Book 9, Page 376 on the 23 day of March, 1992.

The easement of ingress and egress shall included the right of the Grantee to carry out the purposes, rights and duties of the Association under the terms of the Declaration, including but not limited to, the right to preform exterior maintenance under Article V of the Declaration and to remove or correct violations of Article IX of the Declaration.

EXHIBIT

B

VILLAS WEST II HOMEOWNERS ASSOCIATION

PO BOX 2081

KOKOMO, IN 46904-2081

August 20, 2002

Bill & Shirley Ashcraft

4672 Wexmoor Drive

Kokomo, IN 46902-9597
Dear Bill & Shirley:

It has come to the attention of the Board and its Officers that you have violated one of the Covenants and/or By-Laws of the Association, specifically:

> Article IX, Section 4(b): Lease of Dwelling by Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner shall not be allowed. An Owner and his immediate family shall occupy each Dwelling.

If you would like to discuss the matter with any Board member or Officer, please do so at once by writing to the above address. Otherwise, we expect the matter to be corrected right away.

Sincerely,
Malinda Grant
Secretary-Treasurer

STATE OF INDIANA	)	IN THE HOWARD
	)	SUPERIOR COURT
COUNTY OF HOWARD	)	DIVISION II
		2002 TERM
VILLAS WEST II OF	)	CAUSE NO.
WILLOWRIDGE	)	4D02-0210-PL-00893
HOMEOWNERS	)	
ASSOCIATION, INC.	)	FILED
	)	IN OPEN COURT
Plaintiff	)	JAN 10 2003
	)	
VS.	)	HOWARD SUPERIOR
	)	COURT DIVISION 2
EDNA McGLOTHIN	)	
	)	
Defendant	)	

ANSWER, AFFIRMATIVE DEFENSE AND COUNTERCLAIM

I

Defendant Edna McGlothin, for answer to Plaintiff's Complaint, says:

1. She is without information sufficient to form a belief as to the truth of material allegations contained in rhetorical paragraph 1.

2. She admits the material allegations contained in rhetorical paragraphs 2 and 3.

3. She admits that her real property is subject to certain covenants, conditions and restrictions referred to in rhetorical paragraph 4, but denies that she has violated any covenant, condition or restriction which is valid and enforceable by Plaintiff against her.

4. She admits that beginning on August 18, 1999, and continuing through the present she has rented and otherwise allowed the use of her real property by non-family members. She denies that such use is in violation of any covenant, condition or restriction which is enforceable by Plaintiff.

5. Defendant denies the material allegations contained in rhetorical paragraphs 6 and 7.

WHEREFORE, Defendant Edna McGlothin prays that Plaintiff take nothing by its complaint, for judgment for costs of this action and for all other just and proper relief in the premises.

II

Defendant Edna McGlothin for affirmative defense to the allegations contained in Plaintiff's complaint, says:

1. Defendant Edna McGlothin is eighty-eight (88) years old and is presently a patient at Windsor Estates, Kokomo, Indiana.

2. The costs of Defendant's Edna McGlothin's care and treatment at said nursing home are paid by her Social Security Retirement, her husband's veteran's pension, and annuity, rent from real estate which is the subject of this action, and Medicaid benefits.

3. Defendant Edna McGlothin's only assets of value are the real estate which is the subject of this action and an account containing less than $1,500.00.

4. If Defendant Edna McGlothin's dwelling cannot be leased or otherwise occupied by persons who are not members of her immediate family, Edna McGlothin will lose rent which could otherwise be

applied to support her in the nursing home, and Edna McGlothin will be ineligible to receive payments from Medicaid in application of her nursing home expense. As the result of losing rent and qualification for Medicaid benefits, Defendant Edna McGlothin will be forced to sell her home and will not thereafter be eligible for Medicaid benefits until she has exhausted the proceeds of the sale of her home.

5. The provision of the "Amended Declaration of Covenants, Conditions and Restrictions for Villas West II Planned Unit Development, Willowridge Subdivision" which is in issue is Article IX, Harmony and Environmental Controls, Section 4(b), which reads:

> Lease of Dwelling by Owner. For purposes of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family."

6. The real estate which is the subject to this action is located in Howard County, Indiana, and is described as Lot Number 60A, a part of Lot 60 in the Replat of Willowridge Subdivision, Section 2, Villas West Two, a planned unit development, City of Kokomo, Center Township, Howard County, Indiana, as recorded in Recorder's Plat Book 9, page 376. The address of the dwelling located upon said real estate is 513 Delray Street, Kokomo, Indiana 46901.

7. Defendant Edna McGlothin and her husband Algy McGlothin took title to said real estate as

husband and wife by Warranty Deed dated August 26, 1996, recorded in the Office of the Recorder of Howard County, Indiana, on August 26, 1996, in Deed Record 261, page 2754. Defendant Edna McGlothin and her husband Algy McGlothin remained husband and wife at all times thereafter until the death of Algy McGlothin on June 13, 1999, by reason whereof title to said real estate is vested in Defendant Edna McGlothin.

8. Defendant Edna McGlothin and her husband Algy McGlothin purchased said real estate for the price of $88,000.00 from Thomas L. Carlson and Mary C. Carlson.

9. Before contracting to purchase said real estate Defendant's agent inquired of the representative of the developer, Jim Bagley Construction Co., Inc., as to whether there were anything unusual about the covenants. The agent for said developer advised Defendant's agent that there was nothing unusual about the covenants and gave examples like "you can't park trailers and boats in the drives and you can't change the outside without permission."

10. Defendant was not notified by Plaintiff or anyone else prior to or at the completion of the closing of the purchase of said real estate that the owner's title to said real estate would be impaired in that the owner would be forbidden to lease said real estate or to permit persons who were not members of the owner's immediate family to occupy the dwelling upon said real estate.

11. Defendant Edna McGlothin and her husband Algy McGlothin moved into the dwelling upon said real estate and made it their home shortly after

August 26, 1996.

12. Defendant Edna McGlothin was placed in a nursing home in January, 1998.

13. In order to provide care for Algy McGlothin at his home it was necessary for said dwelling to be occupied by persons who were not members of the immediate family of Algy McGlothin and Edna McGlothin. Accordingly, for a period of five (5) months the dwelling upon said real estate was occupied on an around-the-clock basis by persons who were not members of the immediate family of Algy McGlothin and Edna McGlothin.

14. By "LEASE" dated August 18, 1999, Defendant Edna McGlothin leased said real estate to Sue Veach for a term of one (1) year. Sue Veach is not a member of the immediate family of Edna McGlothin. Sue Veach occupied said real estate commencing on or about September 1, 1999, through the end of said term, and continued to occupy said real estate on a month-to-month basis until August 15, 2002.

15. At no time while said real estate was occupied by caretakers of Algy McGlothin or by Sue Veach did any member or representative of Plaintiff, or any other person, tell Defendant that she was forbidden to permit persons other than members of her immediate family to occupy said real estate or that she was forbidden to lease or rent said real estate.

16. Effective September 1, 2002, Defendant leased her said real estate to Juna Brandenburg for a term of one (1) year. Juna Brandenburg is not a member of the immediate family of Defendant Edna

McGlothin.

17. Plaintiff did not at anytime prior to Defendant's entering into said lease agreement with Juna Brandenburg advise Defendant Edna McGlothin that Defendant was forbidden to lease her said real estate.

18. After entering into said lease agreement with Juna Brandenburg, officers of Plaintiff notified Defendant and other members of Villas West II of Willowridge Homeowners Association, Inc. that owners are forbidden to permit persons other than members of their immediate families to occupy their dwellings.

19. Other owners of dwellings in said subdivision permit persons who are not members of their immediate families to occupy their dwellings.

20. Under the facts of this case, it would shock the conscience of civilized Americans and cause irreparable damage to Edna McGlothin for Plaintiff to force Edna McGlothin to evict her tenant, Juna Brandenburg, and thereby cause Edna McGlothin to lose rental income and qualification for Medicaid benefits.

21. Under the facts, Plaintiff is estopped to force Defendant Edna McGlothin to evict her said tenant and thereby incur liability for damages which would result from a wrongful breach of the lease agreement entered into between Defendant Edna McGlothin and Juna Brandenburg.

22. Said Article IX, Section 4(b), is unconscionable and against public policy and, therefore, is unenforceable by Plaintiff against Defendant.

WHEREFORE, Defendant Edna McGlothin prays that Plaintiff take nothing by its complaint, for judgment for costs of this action, and for all other just and proper relief in the premises.

III

Defendant Edna McGlothin, for counterclaim against Plaintiff Villas West II of Willowridge Homeowners Association, Inc., says:

Defendant incorporates herein by reference rhetorical paragraphs 1 through 19 of Pleading Paragraph II, above, as Paragraphs 1 through 19 of this Pleading Paragraph III, the same as if set forth verbatim herein.

20. In making said covenant as set forth in Article IX, Harmony and Environmental Controls, Section 4(b), the developer evidenced an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin.

21. In seeking to enforce said covenant provision, members of Villas West II of Willowridge Homeowners Association, Inc. evidence an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin.

22. Enforcement of the said covenant provision as set forth in Article IX, Harmony and Environmental Controls, Section 4(b) has a discriminatory effect on the availability of housing within the subdivision in violation of the Fair Housing Act.

23. The enforcement of the provisions of said Article IX, Harmony and Environmental Controls, Section 4(b) against Defendant Edna McGlothin would be arbitrary and irrational.

24. The enforcement of said Article IX, Harmony and Environmental Controls, Section 4(b) by Plaintiff is a discriminatory housing practice which has occurred or is about to occur, by reason whereof Defendant Edna McGlothin is entitled to recover from Plaintiff her actual and punitive damages, and reasonable attorney's fee, together with an order enjoining the Plaintiff from engaging in said practice in the future.

WHEREFORE, Defendant Edna McGlothin prays for judgment against Plaintiff Villas West II of Willowridge Homeowners Association, Inc., that said Article IX, Harmony and Environmental Controls, Section 4(b) be declared void, for judgment for actual and punitive damages, for reasonable attorney's fees, for costs of this action, and for all other just and proper relief in the premises.

The undersigned certifies that he served a copy of this Answer, Affirmative Defense and Counterclaim upon Jeremy A. Peelle, Esq., KING, McCANN & SCOTT, LLP, 122 North Main Street, P. O. Box 805, Kokomo, IN 46903-0805 in accordance with the Indiana Rules of Trial Procedure this 10th day of January, 2003.

DAVIS, MURRELL & TATE, P.C.
119 North Buckeye Street
P. O. Box 688
Kokomo, IN 46903-0688
Telephone: (765) 459-4186

By: s/ Joseph H. Davis
Joseph H. Davis,
Attorneys for Defendant

STATE OF INDIANA	)	IN THE HOWARD
	)	SUPERIOR COURT II
COUNTY OF HOWARD	)	
VILLAS WEST II OF	)	CAUSE NO.
WILLOWRIDGE	)	34D02-0210-PL-00893
HOMEOWNERS	)	
ASSOCIATION, INC.,	)	FILED
	)	MAR. 20, 2003
Plaintiff,	)	LINDA KOONTZ
	)	Clerk, Howard
vs.	)	Superior Court,
	)	Division II
EDNA McGLOTHIN,	)	
	)	
Defendant.	)	

PLAINTIFF'S ANSWER TO
DEFENDANT'S COUNTERCLAIM

Comes now the Plaintiff, Villas West II Willowridge Homeowners Association, Inc., by their attorney, Jeremy A. Peelle, and the court having denied their Motion to Dismiss the Plaintiff now answers the Defendant's Counterclaim pursuant to the Indiana Rules of Trial Procedure in the form of the following:

1. Plaintiff is without sufficient information to

admit or deny the material allegations contained in rhetorical paragraph number 20 of Defendant's Counterclaim and as such, deny the same.

2. Plaintiff denies the material allegations contained in paragraph 21 of Defendant's Counterclaim.

3. Plaintiff denies the material allegations contained in paragraph 22 of Plaintiff's Counterclaim.

4. Plaintiff denies the material allegations contained in paragraph 23 of Plaintiff's Counterclaim.

5. Plaintiff denies the material allegations contained in paragraph 24 of Plaintiff's Counterclaim.

Wherefore, the Plaintiff, Villas West II Willowridge Homeowners Association, respectfully request that the Defendant take nothing by way of its Counterclaim, for the costs of this action, for reasonable attorney fees, and for all other relief just and proper in the premises.

Respectfully submitted,

Villas West II Willowridge Homeowners Association

By: s/ Jeremy A. Peelle

Attorney for the Plaintiff

Jeremy A. Peelle, #21775-49
KING, McCANN & SCOTT, LLP
122 North Main Street
P. O. Box 805
Kokomo, IN 46903-0805
Telephone: (765) 459-0751
Facsimile: (765) 459-5950

CERTIFICATE OF SERVICE

I hereby certify that on the 20th of March, 2003, a true and complete copy of the foregoing Motion to Dismiss was served upon Joe Davis, Esq.., DAVIS, MURRELL & TATE, P.C., 119 North Buckeye, P.O. Box 688, Kokomo, Indiana 46901-0688 by depositing the same in the United States mail in an envelope properly addressed to them and affixed with sufficient first class postage.

Jeremy A. Peelle

STATE OF INDIANA)	IN THE HOWARD
)	SUPERIOR COURT II
COUNTY OF HOWARD)	
VILLAS WEST II OF WILLOWRIDGE HOMEOWNERS ASSOCIATION, INC., PLAINTIFF,	CAUSE NO. 34D02-0210-PL-00893
VS.	FILED IN OPEN COURT MAR 10 2005 LINDA KOONTZ Clerk, Howard Superior Court Division II
EDNA McGLOTHIN, DEFENDANT	

DECISION OF THE COURT

This cause was tried to the Court on October 14, and 15, 2004, on issues formed by the Complaint of Plaintiff Villas West II of Willowridge Homeowner's Association, Inc. ("the Association"), Defendant Edna McGlothin's Answer, Affirmative Defense and Counterclaim, Plaintiff's Answer to Defendant's Counterclaim, Defendant's Additional Paragraph of Answer, Affirmative Defense and Counterclaim and Plaintiff's Answer to Defendant's Additional Counterclaim.

FINDINGS OF FACT

The Court, having considered the evidence now finds:

1) Villas West II Planned Unit Development of Willowridge Subdivision was platted in April 1990, and developed by Jim Bagley Construction

Co., Inc.

2) Villas West II is located in the City of Kokomo, Howard County, Indiana. The subdivision has 149 lots each of which contains a dwelling.

3) Jim Bagley Construction Co., Inc. published and caused to be filed in the Office of the Recorder of Howard County "An Amended Declaration of Covenants, Conditions and Restrictions for Villas West II Planned Unit Development, Willowridge Subdivision" recorded April 2, 1992, in Miscellaneous Record 80, page 0458, which contains the following provisions ("the covenants"):

"'Dwelling' shall mean and refer to a single family residence erected on a Lot or a Cluster and shall be used by the owner or a contract purchaser, and his immediate family."

"Lease of Dwelling by Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family."

("the covenants")

4. That Article 9, Section 3 of the Declaration provides the Plaintiff with the right to seek injunctive relief for any violation of the restrictive covenants contained therein and damages arising from same.

5. Algy McGlothin and Edna McGlothin, husband

and wife, by their daughter and attorney-in-fact, Shirley A. Ashcraft, purchased Lot Number 60A in Willowridge Subdivision, Section II, Villas West Two, for $88,000. They took title by Warranty Deed dated August 26, 1996. The Deed contains the following:

> "Subject to the 1996 taxes and assessments due and payable in 1997, and all taxes and assessments due thereafter and subject to any and all easements, agreements and restrictions of record."

6. Algy and Edna McGlothin moved into their dwelling in the Willowridge Community shortly after closing. Edna McGlothin lived in the home until 1998 when she broke her hip and was placed in the Windsor Estates Nursing Home. Algy McGlothin was cared for at his home for a period of five (5) months by persons who occupied the dwelling and were not members of his family. Algy McGlothin was placed in the nursing home in 1998 and remained there until his death on June 13, 1999.
7. By Lease dated August 18, 1999, Edna McGlothin's dwelling in Villas West II was rented to Sue Veach for a term of one (1) year. Sue Veach is not a member of the immediate family of Edna McGlothin. After the one (1) year term, Sue Veach continued to rent the McGlothin residence on a month-to-month basis until July, 2002.
8. Effective August 1, 2002, Edna McGlothin's dwelling in Villas West II was leased to Juna

Brandenburg for a one (1) year term. The term of that lease has been extended to August 31, 2005. Juna Brandenburg is not a member of the immediate family of Edna McGlothin.

9. Edna McGlothin died on December 11, 2004. Edna McGlothin's home in Villas West II is rented to Juna Brandenburg for $550 per month. Of the $550 per month rent, $324.36 net income was paid to the nursing home each month. Edna McGlothin was maintained before her death in the nursing home on a monthly basis with rent of $324.26, Social Security of $1,159.00, Algy McGlothin's disabled veteran's pension of $1,208.00, Edna McGlothin's pensions of $7.50 and $24.76, and an annuity of $455.17. The Indiana Family and Social Services Administration ("Medicaid") made up the shortfall. Edna McGlothin's only assets are her home and a bank account with around $200.

10. Pursuant to 405IAC 2-3-15-©(10) Edna McGlothin was entitled to own her home and receive Medicaid benefits so long as the rental income from her home is greater than the expenses of ownership. The Indiana Family of Social Services Administration ("Medicaid") has advanced $23,363.66 for the care of Edna McGlothin and has served Edna McGlothin with "Notice of Intent to File a Lien on Real Property and Opportunity for a Fair Hearing". If the agency determined that it could not be reasonably be expected that Edna McGlothin would be discharged from the nursing facility to return to

her home, then that agency may place a lien on Edna McGlothin's dwelling to secure repayment of Medicaid payments made. The lien may be foreclosed upon Edna McGlothin's death, or if the property were sold prior to death.

11. Before suit was filed, Shirley Ashcraft, Edna McGlothin's daughter and attorney-in-fact, wrote two letters to Elaine Daulton, President of the Association, explaining Edna McGlothin's need to rent her dwelling. By letter dated August 20, 2002, Malinda Grant, Secretary-Treasurer of the Association gave written notice to Shirley Ashcraft that Edna McGlothin was violating the covenants. By letter dated August 28, 2002, Joseph H. Davis, attorney for Edna McGlothin, advised Malinda Grant that Edna McGlothin's dwelling was rented and that rent and Medicaid pay to maintain Edna McGlothin in the nursing home. The letter also cautioned Ms. Grant that the covenants probably had roots in racial discrimination.
12. By letter dated September 23, 2002, Jeremy A. Peelle, Attorney for the Association, advised Mr. Davis that the Association "is not unsympathetic to the situation involving Mrs. McGlothin, but the action she has taken in renting her premises in violation of the covenants is an unacceptable solution to her problem." Mr. Peelle state, "The association is concerned about its residents and the economic consequences the violation could have on the neighborhood and property values as a whole." With that letter Mr. Peelle enclosed a copy of the Complaint and stated that he would

be seeking an injunction against the renting of the premises, any and all damages, the eviction of the current tenant, and attorney fees.

13. Villas West II is a part of the Willowridge Community. Jim Bagley Construction Co., Inc. advertises the Willowridge Community as "Restricted - your investment is protected here."
14. The word, "restricted," is defined by Webster's Third International Dictionary (1993), as "limited to the use of a particular class of people or specifically excluding others (as members of a class or ethnic group felt to be inferior) (a-residential area) (hotels ...." Other dictionary definitions include" ... limited to white Christians," and "... limited to or admitting only members of a particular group or class, esp. white gentiles."
15. The covenants operate so as to remove housing units within Villas West II from the rental market.
16. There are occasions where dwellings in Villas West Ii have been occupied by persons who were not members of the immediate family of the owner or contract purchaser. In onc situation thc developer sold a unit to a Kentucky limited liability company known as Thomas and Chou Center for Physical Medicine and Rehabilitation, PLLC. The limited liability company could home no immediately family. In another instance Don Holihan, President of the Board of Directors of the Association, had knowledge that the dwelling next to his which was owned by the Ortmans was occupied for three or four months by Jim and

Kathy Long. Jim and Kathy Long were home from Africa to attend their son's wedding. The Longs are no members of the immediate family of the Ortmans.

17. At the time when Edna McGlothin's dwelling was rented to Sue Veach, Jim Bagley Construction Co., Inc. Was in control of and managed the Association. From August 1, 1999 to July, 2002, Edna McGlothin's unit was rented to Sue Veach. There is evidence that personnel at the Jim Bagley Construction Co., Inc. Office knew the home was rented. The Association did not complain during that three (3) year period.
18. According to the U. S. Census Bureau 2000 Census the population of the City of Kokomo is 46,113. 39,242 of those are White alone and 6,023 are persons of races other than White. 4,770 are classified as African American alone. 2,080, or 44% of the African American population resides in Census Tract 2, which is a relatively small area located east and northeast of Kokomo's downtown business area. The area is designated by the City of Kokomo as a low-moderate income area. In that Census Block 370 units are renter occupied and 519 are owner occupied by African American householders.
19. Of the 149 lots in Villas West Ii, there are 147 dwellings owned by white persons and 2 dwellings owned by African Americans. The racial mix of Villas West II is 98.7% white to 1.3% African American. The racial mix of the City of Kokomo is 86.69% white to 10.54% African Amerieau and 2.77% other racial minorities.

20. In the City of Kokomo there are 1,925 housing units which were occupied by African American householders. 889 of those are occupied by householders who own units and 1,036 are occupied by householders who rent units. 1,036 ÷ 1,925 = 54% of African American householders in the City of Kokomo rent their dwellings. The average household size of housing units occupied by African American householders is 2.4 persons. Doing the math, there are 1,036 X 2.4 = 2,486 persons who live in African American rented housing units.
21. The covenants which remove housing units within Villas West II from the rental market effectively exclude the 1,036 African American householders who rent housing units from the subdivision. That is, 54% of all African American householders in Kokomo are excluded from the subdivision.
22. In the City of Kokomo there are 2,602 housing units which are occupied by racially minority householders. 1,156 of these are occupied by householders who own units and 1,446 of those are occupied by householders who rent units. 1,446 ÷ 2,602 = 56% of all racially minority householders in Kokomo rent their dwellings.
23. The covenants which remove housing units in Villas West II from the rental market effectively exclude the 1,446 racially minority householders who rent housing units in the City of Kokomo from the subdivision.
24. There are 18,827 housing units which are owned or rented by White along householders in the City

of Kokomo. 6,431 are renter occupied. Therefore, 6,431 ÷ 18,827 = 34% of White along householders are excluded from the subdivision by the covenants.

25. The covenants exclude 56% of racial minority householders from the subdivision, and only 34% White alone householders from the subdivision.
26. According to the testimony of Dr. Lauster, the models which he used showed that African American householders in Kokomo are far more likely to rent their homes than white householders. For example, comparing 30 year old persons with $40,000 per year income, an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home.
27. The covenants have a greater adverse effect on the African American and racial minority householders than on white householders.
28. The covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority households who could rent homes in the subdivision if homes were available.
29. By the Association's evidence, 27% or 28% of African American households have income sufficient to rent homes in Villas West II if such homes were available for rent.
30. By excluding all renters from Villas West II, the

Association excludes minority households who can afford to rent homes in the subdivision as well as those who cannot afford to rent homes in the subdivision.

31. The covenants along with similar covenants in other subdivisions have the effect of shifting the burden of the rental market and the attendant interracial association with minorities who live in rental houses to other neighborhoods.
32. The Association's reason for excluding renters from the subdivision is that renters do not maintain homes which they rent as well as owners maintain their homes. Therefore, the exclusion of renters helps maintain property values.
33. However, the Declaration of Covenants contains numerous provisions requiring proper maintenance; these include the following, which are included herein by reference:

Article V. Sections 1
Article V. Sections 2
Article V. Sections 2-A
Article IX. Sections 3(a)
Article IX. Section 3(c)
Article IX. Section 3(d)
Article IX. Section 3(e)
Article IX. Section 3(f)
Article IX. Section 3(g)
Article IX. Section 3(I)
Article IX. Section 3(j)

The Plaintiff has, by these provisions, more than adequately assured a neat, clean and visually attractive environment, and a high degree of

property maintenance. The Defendant would still be held to these requirements even while renting her home. Therefore, the Plaintiff's justification for the no-rent provision lacks a factual basis, and is mere subterfuge, rendering said provision unnecessary and useless.

34. There is no showing that the limiting of occupancy of dwellings within Villas West II to owners and members of their immediate families is a business necessity.
35. There is no business necessity that owners of dwellings within Villas West II be prohibited from renting or leasing their dwellings.
36. There is no business necessity that the class of person designated as "renters" be excluded from Villas West II.
37. The Court can find no legitimate non-discriminatory reason for limiting occupancy of dwellings within Villas West to owners and members of their immediate families.

CONCLUSIONS

The Court can find no legitimate reason for the inclusion of Article IX, Section 4(b) (the "no-rent" provision) in the Declaration of Covenants. While it cannot be conclusively determined that this provision was included to foster segregation, there can be no doubt that is has a serious discriminatory result.

Whether the builder of the tract realized it or not, the words "restricted," as used in its advertisements clearly sent a message to the African American community. Dr. Herbert Mitler, an African American professor at Indiana University-Kokomo, himself a

victim of past discrimination, very eloquently and convincingly described how the word "restricted" is what the black community commonly knows to be a "code word" indicating that African Americans (and perhaps other minorities) are not welcome.

While the Plaintiff demonstrated that a few African Americans do own homes in Villas West II, thereby attempting to counter any discriminatory effect argument, such evidence was not persuasive. Thankfully, this country's laws are now such that it is virtually impossible to manifestly deny ownership of a home to a minority member or family. A no-rent provision accomplishes a similar goal, however, in a more subtle way.

Furthermore, the covenant, if enforced, would have harmed the Defendant had she survived these proceedings. She would have lost rent and her qualification for Medicaid unless she sold her home. Conversely, the Plaintiff suffers no conceivable harm by disallowing enforcement.

The statistics that the Defendant presented to the Court clearly prove that the restriction has a significantly greater negative impact on African American members of this Community than it does on the Caucasian population.

The stated policy of the United States is to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C.3601. It is not fair to deny 1,446 racially minority householders who rent their homes, that is 56% of all racially minority householders, all opportunity to rent dwellings in Villas West II from owners in Villas West II who want to rent their

dwellings. The purposes of the Association must give way to the policy of the United States.

Publication of the advertisement, "Restricted - your investment is protected here," and publication and enforcement of the covenants constitute discriminatory housing practices under 42 U.S.C. Section 3604. The Association's threat to sue Edna McGlothin if she did not evict her tenant and cease renting her dwelling, and the filing of its complaint for an injunction claiming attorney's fees and costs to which the Association was not then entitled, make Edna McGlothin an aggrieved person under 42 U.S.C. 3613.

As an aggrieved person, Edna McGlothin is entitled to recover under federal law from the Association her actual, nominal and punitive damages, and reasonable attorney's fee and costs.

JUDGMENT

IT IS, THEREFORE, ORDERED, that the covenants be, and they are hereby declared void and of no force and effect. The Court entered Judgment for Defendant Edna McGlothin and against Plaintiff Villas West II of Willowridge Homeowners Association, Inc. On Plaintiff's Complaint.

The Court enters Judgment for Counterclaimant Edna McGlothin and against Counterdefendant Villas West II of Willowridge Homeowners Association, Inc. On Edna McGlothin's Counterclaim for $1.00 nominal damages.

Hearing to determine reasonable attorney's fees and expenses of litigation will be held on May 26, 2005 at 8:30 a.m. as a one day setting.

SO ORDERED THIS 10th DAY OF MARCH, 2005.

S/ Stephen M.Jessup
STEPHEN M. JESSUP, JUDGE
HOWARD SUPERIOR COURT II

FOR PUBLICATION

ATTORNEYS FOR APPELLANT:

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FILED
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Kevin S. Smith
CLERK OF THE INDIANA
SUPREME COURT
COURT OF APPEALS
AND TAX COURT

IN THE
COURT OF APPEALS OF INDIANA

VILLAS WEST II OF WILLOWRIDGE, HOMEOWNERS ASSOCIATION, INC., Appellant-Plaintiff/ Cross-Defendant,	)	
vs.	)	No. 34A02-0504-CV-370
EDNA McGLOTHIN,	)	

Appellee-Defendant/)
Cross-Claimant.)

APPEAL FROM THE
HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0210-PL-893

January 30, 2006

OPINION - FOR PUBLICATION

SHARPNACK, Judge

Villas West II of Willowridge Homeowners' Association, Inc. ("Association") appeals the trial court's judgment in favor of Shirley Ashcraft, as personal representative of the estate of Edna McGlothin, deceased ("McGlothin").[1]

The Association raises two issues, which we restate as:

I. Whether the trial court erred by denying the Association's motion for summary judgment where McGlothin admitted violating a restrictive covenant that prohibited leasing of a residence; and

II. Whether the trial court's judgment that the restrictive covenant against leasing violated the

[1] Edna McGlothin died in December 2004, after the bench trial but before the trial court issued its order. Shirley Ashcraft, as personal representative of the estate of Edna McGlothin, deceased, filed the appellee's brief on appeal.

Fair Housing Act, 42 U.S.C. §§ 3601-3619, is clearly erroneous.

We affirm.

The relevant facts follow. In 1996, Algie and Edna McGlothin purchased a residence in Villas West II of Willowridge ("Villas West II") in Kokomo, Indiana. Residences in Villas West II are "duplex condo-style homes." Transcript at 161. The covenants for the Villas West II, which were recorded by Jim Bagley Construction Co., Inc. ("Jim Bagley Construction") in 1992, provide, in part:

> "Dwelling" shall mean and refer to a single family residence erected on a Lot or a Cluster and shall be used by the owner or a contract purchaser, and his immediate family.
>
> * * * * *
>
> Lease of Dwelling By Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family.

Appellant's Appendix at 28, 43. Jim Bagley Construction controlled the homeowners' association until May 2000, when it turned control of the homeowners' association over to the homeowners.

In January 1998, Edna was placed in a nursing home, and Algie was placed in a nursing home about

six months later.[2] On August 18, 1999, Ashcraft leased the residence to Sue Veach for a term of one year. Veach leased the residence until July 2002. In August 2002, Ashcraft leased the residence to Juna Brandenburg, and the term of that lease was extended to August 31, 2005.

In August 2002, the Association notified Ashcraft that McGlothin was in violation of the covenants by leasing her residence. In October 2002, the Association filed a complaint for injunctive relief against McGlothin, alleging that McGlothin was violating the covenant against leasing a residence and requesting injunctive relief and attorney fees. McGlothin filed an answer, affirmative defense, and counterclaim. McGlothin admitted that she was renting the residence but denied that the covenant was valid and enforceable. McGlothin's affirmative defenses alleged that she was not informed of the covenant until August 2002, that she had rented the residence since August 1999, and that she would lose her Medicaid benefits if she was unable to lease the residence, and provided:

> 20. Under the facts of this case, it would shock the conscience of civilized Americans and cause irreparable damage to [McGlothin] for [the Association] to force [McGlothin] to evict her tenant, Juna Brandenburg, and thereby cause [McGlothin] to lost rental income and qualification for Medicaid benefits.

[2] Algie died in June 1999.

21. Under the facts, [the Association is] estopped to force [McGlothin] to evict her tenant and thereby incur liability for damages which would result from a wrongful breach of the lease agreement entered into between [McGlothin] and Juna Brandenburg.
22. Said Article IX, Section 4(b), is unconscionable and against public policy, and therefore, is unenforceable by [the Association] against [McGlothin].

Appellant's Appendix at 55. McGlothin's counterclaim alleged that the covenant against leasing "evidenced an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin" and that the covenant "has a discriminatory effect on the availability of housing within the subdivision in violation of the Fair Housing Act." Id. at 56.

The Association filed a motion for summary judgment and alleged that McGlothin's property was subject to the covenant, that McGlothin admitted violating the covenant, and that the Association was entitled to summary judgment. In support of its motion, the Association designated its complaint, McGlothin's answer, the amended declaration of covenants, conditions, and restrictions for Villas West II, and its brief in support of its motion for summary judgment. Thus, the Association designated evidence that demonstrated that McGlothin's property was subject to the covenant and that McGlothin admitted violating the covenant.

McGlothin responded to the Association's motion

for summary judgment by arguing that the Association had failed to establish each factor entitling it to an injunction and that the Association lost the right to injunctive relief through "waiver, lashes [sic], or similar conduct." Id. at 76. Although she did not request summary judgment on her counterclaim regarding the Fair Housing Act, McGlothin also responded to the Association's motion for summary judgment by arguing that the covenant was discriminatory under the Fair Housing Act. After a hearing, the trial court denied the Association's motion for summary judgment and found that "at least two issues are present; whether or not the [Association] is barred by laches and whether or not the [Association's] covenant is discriminatory." Id. at 3.

The trial court then held a bench trial and entered the following findings of fact and conclusions thereon:

FINDINGS OF FACT

The Court, having considered the evidence now finds:

1. Villas West II Planned Unit Development of Willowridge Subdivision was platted in April 1990, and developed by Jim Bagley Construction Co., Inc.
2. Villas West II is located in the City of Kokomo, Howard County, Indiana. The subdivision has 149 lots each of which contains a dwelling.
3. Jim Bagley Construction Co., Inc. published and caused to be filed in the Office of the Recorder of Howard County "An Amended

Declaration of Covenants, Conditions and Restrictions for Villas West II Planned Unit Development, Willowridge Subdivision" recorded April 2, 1992, in Miscellaneous Record 80, page 0458, which contains the following provisions ("the covenants"):

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4. That Article 9, Section 3 of the Declaration provides the Plaintiff with the right to seek injunctive relief for any violation of the restrictive covenants contained therein and damages arising from same.
5. [Algie] McGlothin and Edna McGlothin, husband and wife, by their daughter and attorney-in-fact, Shirley A. Ashcraft, purchased Lot Number 60A in Willowridge Subdivision, Section II, Villas West Two, for $88,000. They took title by Warranty Deed dated August 26, 1996. The Deed contains the following:

> "Subject to the 1996 taxes and

assessments due and payable in 1997, and all taxes and assessments due thereafter and subject to any and all easements, agreements and restrictions of record."

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to the use of a particular class of people or specifically excluding others (as members of a class of ethnic group felt to be inferior) (a residential area) (-hotels. . ." Other dictionary definitions include ["] . . . limited to white Christians," and ". . . limited to or admitting only members of a particular group or class, esp. white gentiles."

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is 2.4 persons. Doing the math, there are 1,036 x 2.4 = 2,486 persons who live in African American rented housing units.

21. The covenants which remove housing units within Villas West II from the rental market effectively exclude the 1,036 African American householders who rent housing units from the subdivision. This is, 54% of all African American householders in Kokomo are excluded from the subdivision.
22. In the City of Kokomo there are 2,602 housing units which are occupied by racially minority householders. 1,156 of these are occupied by householders who own units and 1,446 of those are occupied by householders who rent units. 1,446 [divided by] 2,602 = 56% of all racially minority householders in Kokomo rent their dwellings.
23. The covenants which remove housing units in Villas West II from the rental market effectively exclude the 1,446 racially minority householders who rent housing units in the City of Kokomo from the subdivision.
24. There are 18,827 housing units which are owned or rented by White alone householders in the City of Kokomo. 6,431 are renter occupied. Therefore 6,431 [divided by] 18,827 = 34% of White alone householders are excluded from the subdivision by the covenants.
25. The covenants exclude 56% of racial minority householders from the subdivision, and only 34% White alone householders from the subdivision.
26. According to the testimony of Dr. Lauster, the

models which he used showed that African American householders in Kokomo are fare more likely to rent their homes than white householders. For example, comparing 30 year old persons with $40,000 per year income, an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home.

27. The covenants have a greater adverse effect on the African American and racial minority householders than on white householders.
28. The covenants limit interracial association between residents of Villas West II and householders of minority race to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority households who could rent homes in the subdivision if homes were available.
29. By the Association's evidence, 27% or 28% of African American households have income sufficient to rent homes in Villas West II if such homes were available for rent.
30. By excluding all renters from Villas West II, the Association excludes minority households who can afford to rent homes in the subdivision as well as those who cannot afford to rent homes in the subdivision.
31. The covenants along with similar covenants in other subdivisions have the effect of shifting the burden of the rental market and the attendant interracial association with minorities who live in rental houses to other neighborhoods.

32. The Association's reason for excluding renters from the subdivision is that renters do not maintain homes which they rent as well as owners maintain their homes. Therefore, the exclusion of renters helps maintain property values.
33. However, the Declaration of Covenants contains numerous provisions requiring proper maintenance; these include the following, which are included herein by reference:

Article V. Sections 1
Article V. Sections 2
Article V. Sections 2-A
Article IX. Sections 3(a)
Article IX Sections 8(c)
Article IX. Section 3(d)
Article IX. Section 3(e)
Article IX. Section 3(f)
Article IX. Section 3(g)
Article IX. Section 3(I)
Article IX. Section 3(j)

The Plaintiff has, by these provisions, more than adequately assured a neat, clean and visually attractive environment, and a high degree of property maintenance. The Defendant would still be held to these requirements even while renting her home. Therefore, the Plaintiff's justification for the no-rent provision lacks a factual basis, and is mere subterfuge, rendering said provision unnecessary and useless.
34. There is no showing that the limiting of occupancy of dwellings within Villas West II to owners and members of their immediate families

is a business necessity.

35. There is no business necessity that owners of dwellings within Villas West II be prohibited from renting or leasing their dwellings.
36. There is no business necessity that the class of person designated as "renters" be excluded from Villas West II.
37. The Court can find no legitimate non-discriminatory reason for limiting occupancy of dwellings within Villas West II to owners and members of their immediate families.

CONCLUSIONS

The Court can find no legitimate reason for the inclusion of Article IX, Section 4(b) (the "no-rent" provision) in the Declaration of Covenants. While it cannot be conclusively determined that this provision was included to foster segregation, there can be no doubt that it has a serious discriminatory result.

Whether the builder of the tract realized it or not, the words "restricted," as used in its advertisements clearly sent a message to the African American community. Dr. Herbert Mitler, an African American professor at Indiana University-Kokomo, himself a victim of past discrimination, very eloquently and convincingly described how the word "restricted" is what the black community commonly knows to be a "code word" indicating that African Americans (and perhaps other minorities) are not welcome.

While the Plaintiff demonstrated that a few African Americans do own homes in Villas West II, thereby attempting to counter any discriminatory effect argument, such evidence was not persuasive.

Thankfully, this country's laws are now such that it is virtually impossible to manifestly deny ownership of a home to a minority member or family. A no-rent provision accomplishes a similar goal, however, in a more subtle way.

Furthermore, the covenant, if enforced, would have harmed the Defendant had she survived these proceedings. She would have lost rent and her qualification for Medicaid unless she sold her home. Conversely, the Plaintiff suffers no conceivable harm by disallowing enforcement.

The statistics that the Defendant presented to the Court clearly prove that the restriction has a significantly greater negative impact on African American members of this community than it does on the Caucasian population.

The stated policy of the United States is to provide, within constitutional limitations, for fair housing throughout the Unite States. 42 U.S.C. 3601. It is not fair to deny 1,446 racially minority householders who rent their homes, that is 56% of all racially minority householders, all opportunity to rent dwellings in Villas West II from owners in Villas West II who want to rent their dwellings. The purposes of the Association must give way to the policy of the United States.

Publication of the advertisement, "Restricted - your investment is protected here," and publication and enforcement of the covenants constitute discriminatory housing practices under 42 U.S.C. Section 3604. The Association's threat to sue Edna McGlothin if she did not evict her tenant and cease renting her dwelling, and the filing of its complaint

for an injunction claiming attorney's fees and costs to which the Association was not then entitled, make Edna McGlothin an aggrieved person under 42 U.S.C. 3613.

As an aggrieved person, Edna McGlothin is entitled to recover under federal law from the Association her actual, nominal and punitive damages, and reasonable attorney's fee and costs.

JUDGMENT

IT IS, THEREFORE, ORDERED, that the covenants be, and they are hereby declared void and of no force and effect. The Court enters Judgment for Defendant Edna McGlothin and against Plaintiff Villas West II of Willowridge Homeowners Association, Inc. on Edna McGlothin's Counterclaim for $1.00 nominal damages.
Appellant's Appendix at 10-21.

I.

The first issue is whether the trial court erred by denying the Association's motion for summary judgment where McGlothin admitted violating a restrictive covenant that prohibited leasing of a residence. We first note that once final judgment has been entered following trial, the ultimate determination of the trier of fact upon the merits of the claim has taken place and the interlocutory nature of the denial of summary judgment terminates. Keith v. Mendus, 661 N.E. 2d 26, 35 (Ind. Ct. App. 1996), trans. denied. Thus, a party who fails to bring an interlocutory appeal from the denial of a motion for summary judgment may

nevertheless pursue appellate review after the entry of final judgment. Id. "Such a denial does not irretrievably dispose of one or more issues between the parties; neither does it determine nor foreclose the fights of the parties." Id. "Rather, the denial of a motion for summary judgment merely places the parties' rights in abeyance pending ultimate determination by the trier of fact." Id. Consequently, although this case proceeded to trial and the trial court entered final judgment on McGlothin's claims, we may still review the trial court's ruling on the Association's motion for summary judgment. See, e.g., Northern Indiana Public Service Co. v. Dabagia, 721 N.E. 2d 294, 298 (Ind. Ct. App. 1999), reh'g denied, trans. denied.

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it is for the trial court: we examine whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. City of North Vernon v. Jennings Northwest Regional Util., 829 N.E. 2d 1, 3 (Ind. 2005). "Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law." Id. We construe all evidence in favor of the opposing party, and we resolve all doubts as to the existence of a material issue against the moving party. Id.

The Association requested summary judgment on its complaint against McGlothin but did not request summary judgment on McGlothin's counterclaim. In

response, McGlothin argued, in part, that the Association's injunctive relief was barred as to laches. Moreover, although she did not request summary judgment on her counterclaim regarding the Fair Housing Act, McGlothin also responded to the Association's motion for summary judgment by arguing that the covenant was discriminatory under the Fair Housing Act. The trial court denied the Association's motion for summary judgment because it found that "at least two issues [were] present; whether or not the [Association] is barred by laches and whether or not the [Association's] covenant is discriminatory." Appellant's Appendix at 3.

On appeal, the Association argues that it was entitled to summary judgment and that the trial court erred by denying its motion for summary judgment on both grounds. "We will affirm the denial of summary judgment if it is sustainable on any legal theory or basis found in the evidentiary matter designated to the trial court." Ford v. Culp Custom Homes, Inc., 731 N.E. 2d 468, 472 (Ind. Ct. App. 2000), trans. denied. Thus, we may affirm the trial court's denial of the Association's motion for summary judgment if it is sustainable on either basis.

We conclude that the denial of the Association's motion for summary judgment is sustainable on the basis of laches. After the Association filed its motion for summary judgment, McGlothin responded by arguing, in part, that the Association lost the right to injunctive relief through "waiver, lashes [sic], or similar conduct." Appellant's Appendix at 76. The trial court denied the Association's motion for

summary judgment, in part, because it found that genuine issues of material fact existed as to whether the Association's claim was barred by laches.

On appeal, the Association argues that the trial court erred by denying its motion for summary judgment based upon laches because McGlothin failed to plead this defense in her affirmative defenses. However, the Association did not present this argument to the trial court. It is well settled that arguments not presented to the trial court on summary judgment are waived on appeal. King v. Ebrens, 804 N.E. 2d 821, 826 (Ind. Ct. App. 2004). The trial court "cannot be found to have erred as to an issue or argument that it never had an opportunity to consider." GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC, 764 N.E. 2d 647, 651 (Ind. Ct. App. 2002). Thus, the Association has waived this argument. See, e.g., King, 804 N.E. 2d at 826 (holding that a party waived its objections on appeal to an affidavit presented in support of a motion for summary judgment by failing to raise its objections to the trial court); Mannon v. Howmet Transp. Serv., Inc., 641 N.E. 2d 70, 73 n.1 (Ind. Ct. App. 1994) (holding that the party moving for summary judgment waived its argument that the opposing party's affidavit should not be considered because the moving party never objected to the timeliness of the affidavit to the trial court), reh'g denied. The Association makes no other argument demonstrating that the trial court erred by denying the motion for summary judgment on the basis of laches. Thus, we conclude that the Association failed to meet its burden of demonstrating that the trial

court erred by denying its motion for summary judgment on the basis of laches. The Association also argues that the trial court erred by denying its motion for summary judgment on the basis of the discriminatory nature of the covenant. However, we need not address this issue because the denial of the motion for summary judgment is sustainable on the basis of laches.

II.

The next issue is whether the trial court's judgment that the restrictive covenant against leasing violated the Fair Housing Act, 42 U.S.C. §§ 3601-3619, is clearly erroneous. The trial court entered findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E. 2d 1206 (Ind. 2000), reh'g denied. In our review, we first consider whether the evidence supports the factual findings. Id. Second, we consider whether the findings support the judgment. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E. 2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, 726 N.E. 2d at 1210. We give due regard to the trial court's ability to assess the credibility of witnesses. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable

inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E. 2d 1265, 1268 (Ind. 1999).

The Association argues that the trial court's finding that the restrictive covenant is "void" is clearly erroneous. Appellant's Appendix at 21. The Association's complaint against McGlothin was based upon her violation of the restrictive covenant against leasing the residence.[3] In general, a restrictive covenant is a contract between a grantor and a grantee that restricts the grantee's use of land. Holliday v. Crooked Creek Vill. Homeowners Ass'n, Inc., 759 N.E. 2d 1088, 1092 (Ind. Ct. App. 2001). "The general purpose of a restrictive covenant is to maintain or enhance the value of adjacent property by controlling the nature and use of surrounding properties." Id. Restrictive covenants are generally disfavored in the law and will be strictly construed by the courts, which resolve all doubts in favor of the

[3] The developer testified that Villas West II contained "duplex condo-style homes," not "true condominium[s]." Transcript at 160-161. We note that condominiums are governed by Ind. Code §§ 32-25-1-1 to 32-25-9-2. Ind. Code § 32-25-9-1 provides that "[e]ach condominium unit owner shall comply with . . . the covenants, conditions, and restrictions set forth in: (A) the declaration; or (B) the deed to the owner's condominium unit." I.C. § 32-25-9-1(a). The failure to comply with the covenants, conditions, and restrictions is grounds for an action: "(1) to recover sums due; (2) for damages; (3) for injunctive relief; or (4) for any other legal or equitable relief . . . ." I.C. § 32-25-9-1(b). The statutes do not specifically address whether restrictive covenants prohibiting the leasing of a condominium are valid.

free use of property and against restrictions. Grandview Lot Owners Ass'n, Inc. v. Harmon, 754 N.E. 2d 554, 557 (Ind. Ct. App. 2001). "[T]he power of a court to issue a mandatory injunction as a means of enforcing restrictive covenants is well-established." Depeyster v. Town of Santa Claus, 729 N.E. 2d 183, 190 (Ind. Ct. App. 2000).

Nevertheless, restrictive covenants are a form of express contract recognized under the law. Grandview, 754 N.E.2d at 557. "[B]ecause of their contractual nature, restrictive covenants are enforced as long as the restrictions are unambiguous and do not violate public policy." Holliday, 759 N.E.2d at 1092. For example, restrictive covenants that restrict use of land based on race are unconstitutional, and racial restrictions contained in deeds are invalid. Corner v. Mills, 650 N.E.2d 712, 715 (Ind. Ct. App. 1995) (citing Shelley v. Kraemer, 334 U.S. 1, 23, 68 S.Ct. 836, 847 (1948). Illegal restrictive covenants "may be removed if to do so will not affect the intent or symmetry of the remaining covenants." Id. (citing Brokaw v. Brokaw, 398 N.E.2d 1385, 1388 (Ind. Ct. App. 1980)).

The Association cites numerous cases from other jurisdictions holding that restrictive covenants prohibiting leasing of condominiums are, in general, valid and enforceable. See, e.g., Woodside Vill. Condo. Ass'n, Inc. v. Jahren, 806 So.2d 452 (Fla. 2002); Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill, Ct. App. 1995). However, the trial court found that restrictive covenants prohibiting leasing violated the Fair Housing Act. Consequently, the issue on appeal is whether the

trial court's finding that the restrictive covenant prohibiting leasing violated the Fair Housing Act and was unenforceable is clearly erroneous."[4] Neither party cites authority directly on point, and our research likewise reveals no relevant authority on this issue. See generally David E. Grassmick, Minding the Neighbor's Business: Just How Far Can Condominium Owners' Associations Go In Deciding Who Can Move Into The Building, 2002 U. ILL. L.REV. 185 (2002).

We begin by noting that resolution of this issue turns on the interpretation of a federal statute. The Indiana Supreme Court has held that "[a]lthough U.S. Supreme Court decisions pertaining to federal questions are binding on state courts, lower federal court decisions may be persuasive but have non-binding authority on state courts." Indiana Dep't of Pub. Welfare v. Payne, 622 N.E.2d 461, 468 (Ind. 1993) (citing Pennsylvania R.R. Co. v. F.E. Mathias Lumber Co., 113 Ind. App. 133, 136, 47 N.E.2d 158, 159 (1943)), reh'g denied. In F.E. Mathias Lumber, the court held:

[4] McGlothin's counterclaim was brought under the federal Fair Housing Act only. McGlothin made no argument at trial regarding the Indiana Fair Housing Act, Ind. Code § 22-9.5-1-1 through Ind. Code § 22-9.5-11-3, and the Indiana Fair Housing Act is not at issue in the appeal. We also note that the federal Fair Housing Act provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach." 42 U.S.C. § 3613(a)(1)(A). Thus, we have jurisdiction to consider this issue.

> "Where a question is federal in its nature, the decisions of the supreme court of the United States are absolutely binding on the various state courts and must be followed." 21 C.J.S., Courts, p. 365, § 206; 15 C.J., p. 930, § 318. While there is a conflict as to whether the decisions of the lower federal courts are binding on state courts, the weight of authority is, that while such decisions have a persuasive authority, they are not binding on the state courts. This is certainly true when the decisions of such federal courts themselves are in conflict. 21 C.J.S., Courts, p. 377, § 206; Brown v. Palmer Clay Products Co., 1935, 290 Mass. 108, 185 N.E. 122, 123; State ex rel. v. Taylor, 1923, 298 Mo. 474, 251 S.W. 383, 387.

F.E. Mathias Lumber Co., 113 Ind. App. at 136-137, 47 N.E.2d at 159.

The Fair Housing Act, commonly referred to as Title VIII (the "Act"), makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The Act was passed "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The statute was intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of

racial groups whose lack of opportunities the Act was designed to combat." Hispanics United of DuPage County v. Vill. of Addison, 988 F.Supp. 1130, 1150 (N.D. Ill. 1997) (citing Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights ("the Arlington II"), 558 F.2d 1283, 1289 (7th Cir. 1977), cert. denied, 434 U.S. 1025, 98 S. Ct. 752 (1978)). "To fulfill this aim, courts are to apply the [Act's] terms liberally: "It has long been recognized that to give full measure to the Congressional purpose behind the [Act], courts have given broad interpretation to the statute.'" Id. (quoting Snyder v. Barry Realty, Inc., 953 F.Supp. 217, 219 (N.D. Ill. 1996)); see also Gomez v. Chody, 867 F.2d 395, 402 (7th Cir. 1989) ("Courts have thus applied the Act broadly within its terms."), reh'g denied.

There are two theories of discrimination by which plaintiffs may proceed under the Act: (1) disparate treatment(i.e., intentional discrimination);[5] and (2) disparate impact (i.e., discriminatory effect). Cavalieri-Conway v. L. Butterman & Assoc.,992F.Supp. 995, 1002 (N.D. Ill. 1998), aff'd by 172 F.3d 52 (7th Cir. 1999), cert. denied, 528 U.S. 847, 120 S.Ct. 121 (1999); Anast v. Commonwealth Apartments, 956 F.Supp. 792, 800 (N.D. Ill. 1997).

[5] To establish a prima facie case of disparate treatment, a plaintiff "may establish that a defendant had a discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the inferential burden shifting method known as the McDonnell Douglas test." Kormoczy v. HUD, 53 F3d 821, 823-824 (7th Cir. 1995).

Only disparate impact is at issue here. Such claims arise where a "facially neutral policy or action has an unequal impact on different subgroups in the housing market." Phillips v. Hunter Trails Cmty. Ass'n, 685 F.2d 184, 189 (7th Cir. 1982).

Despite decades of litigation, a uniform standard for determining impact jurisprudence has been described as "an increasingly incoherent body of case law." Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair and Lending Law, and the Antidiscrimination Principle, 47 EMORY L. J. 409 (Spr. 1998) ("Notwithstanding the large number of cases decided employing [the disparate impact label], the standard in the fair housing/fair lending arena continues to be sketchy and haphazard.") In Hispanics United of DuPage County v. Vill. of Addison, 988 F.Supp. 1130 (N.D. Ill. 1997), the district court engaged in an extensive analysis of disparate impact jurisprudence. We find the analysis in Hispanics United persuasive. In examining the burden of proof, the court began by noting:

> [Fair Housing Act] disparate impact jurisprudence relies heavily on Title VII case law, which forces the employer to defend its interests by imposing on it the burden of proving business necessity to rebut a prima facie case of discriminatory effect. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-33, 91 S.Ct. 849, 853-54, 28 L.Ed.2d 158 (1971). Indeed, the Seventh Circuit has recognized that the *Arlington*

> *Heights II* analysis "was in fact though not in words the 'disparate impact' analysis familiar from Title VII cases." *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990).

Hispanics United, 988 F.Supp. at 1160. Under the Seventh Circuit's Title VII disparate impact jurisprudence:

> To succeed on a disparate impact claim, plaintiffs bear the burden of showing that a particular employment practice causes a disparate impact on the basis of race. Once this impact is shown, the defendant must demonstrate that the practice is "job related" and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(I). If the defendant makes this showing, plaintiffs can still prevail by demonstrating that an alternative employment practice exists, and the defendant refuses to adopt it. *See* 42 U.S.C. § 2000e-2(k)(1)(A); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

Allen v. City of Chicago, 351 Fed. 306, 311-312 (7th Cir. 2003). Similarly, in Hispanics United, the district court concluded that if a plaintiff makes a prima facie showing, the defendant has the burden of proving a bona fide and legitimate justification for the housing action. Hispanics United, 988 F.Supp. at 1162. If the defendant makes this showing, the plaintiff has the burden of proving that less

discriminatory alternatives were available. Id.

In general, the federal courts with the Seventh Circuit have held that "Plaintiffs can establish a prima facie disparate impact case under the [Act] simply by showing that Defendants' actions had discriminatory effects upon a protected class."[6] Wallace v. Chicago Hous. Auth., 321 F.Supp. 2d 968, 973-974 (N.D. Ill. 2004) (citing Arlington II, 558 F.2d at 1289-90, and Snyder, 953 F.Supp. at 219). "The question in any disparate impact claim under the [Act] is 'whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on

[6] In analyzing an Indiana Fair Housing Act claim, the Indiana Supreme court, relying upon federal cases, discussed the disparate impact analysis and noted:

> [T]o establish a prima facie case of disparate impact, a plaintiff must prove that the defendant's actions had a discriminatory effect. United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992). If the plaintiff succeeds, then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. Id. If the Defendant satisfies this burden, then the plaintiff has the opportunity to prove that the legitimate reasons asserted by the defendant are in fact mere pretext. Id.

State, Civil Rights Comm'n v. County Line Park, Inc., 738 N.E.2d 1044, 1049 (Ind. 2000). However, disparate impact was not at issue in County Line Park, and the court did not analyze the issue further.

members of a protected class.'" Id. (quoting Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996), reh'g denied, cert. denied, 519 U.S. 1041, 117 S.Ct. 610 (1996)).

Additionally, in Arlington II, the Seventh Circuit held that "at least under some circumstances a violation of [42 U.S.C. §] 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent." Arlington II, 558 F.2d at 1290; see generally John E. Theuman, Evidence of Discriminatory Effect Alone as Sufficient to Prove or to Establish Prima Facie Case of, Violation of Fair Housing Act ((42 USCS §§ 3601 et seq.), 100 A.L.R. FED. 97. The court went on to hold as follows:

> Plaintiffs contend that once a racially discriminatory effect is shown a violation of section 3604(a) is necessarily established. We decline to extend the reach of the Fair Housing Act this far. Although we agree that a showing of discriminatory intent is not required under section 3604(a), we refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases. See Brest, [The Supreme Court, 1975 Term Foreword: In Defense of the Antidiscrimination Principle, 90 HARV.L.REV. 1, 29 (1976). Rather, the courts must use their discretion in deciding whether, given the particular

> circumstances of each case, relief should be granted under the statute.
>
> We turn now to determining under what circumstances conduct that produces a discriminatory impact but which was taken without discriminatory intent will violate section 3604(a). Four critical factors are discernible from previous cases. They are: (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis[, 426 U.S. 229, 96 S.Ct. 2040 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Arlington II, 558 F.2d at 1290. The Seventh Circuit clarified in Phillips v. Hunter Trails Community Association that "statistical disproportion alone was not enough [in a disparate impact case], but neither did a plaintiff have to prove discriminatory intent to succeed on his purely statutory claim" and rephrased the four factors as: "(1) the strength of the plaintiff's statistical showing; (2) the legitimacy of the defendant's interest in taking the action complained of; (3) some indication - which might be suggestive rather than conclusive - of discriminatory intent; and

(4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant."[7] Phillips, 685 F.2d at 189-190. However, the Seventh Circuit has not clarified whether the factors are part of the plaintiff's prima facie case or whether they are to be considered in the final determination on the merits. Compare Hispanics United, 988 F.Supp. at 1151, with Snyder, 953 F.Supp. at 220, see also Reese v. Miami-Dade County, 242 F.Supp. 2d 1292, 1304 n.9 (S.D. Fla. 2002), aff'd by 77 Fed. Appx. 506 (11th Cir. 2003). After an analysis of both positions, the court in Hispanics United concluded that the factors are "used to navigate to a conclusion on the merits" rather than establish a prima facie case. Hispanics United, 988 F.Supp. at 1153. We find the analysis of Hispanics United to be persuasive and will consider

[7] The Seventh Circuit has recognized that the "disparate impact analysis is not appropriate is certain contexts." Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995) (citing NAACP v. American Family Mutual Ins., 978 F.2d 287 (7th Cir. 1992), reh'g denied, cert. denied, 508 U.S. 907, 113 S.Ct. 2335 (1993), and Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990), reh'g denied). Neither party argues that these are applicable here.

the applicability of the Arlington II factors in making a final determination on the merits.[8]

[8] Relying upon Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1984), McGlothin argues that the Arlington II factors are applicable only to governmental bodies. In Betsey, the court held:

> As the last component of this analysis suggests, the *Clarkton* [i.e., Arlington II test has been applied only in situations where a public body is the defendant. Where, as here, a private entity is involved the analysis is more straightforward. The inquiry is whether either discriminatory intent or impact can be proved and, if either or both is proved, whether there is a legitimate non-discriminatory reason sufficient to overcome the showing of intent, or whether a compelling business necessity exists, sufficient to overcome the showing of disparate impact. Obviously, a business necessity test is inapplicable in situations where the defendant is a public entity. The *Clarkton* formulation similarly has no application to private defendants.

Betsey, 736 F.2d at 989 n.5. However, in Snyder, 953 F.Supp. at 220, the Northern District of Illinois applied the Arlington II factors to a private defendant. Moreover, although the Seventh Circuit in Phillips ultimately determined that the plaintiff succeeded on a disparate treatment theory and did not apply the disparate impact analysis, the court discussed the Arlington II factors and did not mention the fact that the case involved a private rather than public defendant. Phillips, 685 F.2d at 190. Consequently, we reject McGlothin's contintion that the Arlington II factors are inapplicable.

A. Arlington II Factors.

Because several of the Arlington II factors are relevant to the burden-shifting analysis, we will begin by analyzing the Arlington II factors.

1. Statistical Showing.

The first Arlington II factor is "the strength of [McGlothin's] statistical showing."[9] Phillips, 685 F.2d at 190. On this issue, the trial court found:

> 18. According to the U.S. Census Bureau 2000 Census Bureau 2000 Census the population of the City of Kokomo is 46,113. 39,247 of those are White alone and 6,023 are persons of races other than White. 4,770 are classifie4d as African American along. 2,080, or 44% of the African American population resides in Census Tract 2, which is a relatively small area located east and northeast of Kokomo's downtown business area. The area is designated by the City of Kokomo as a low-moderate income area. In that Census Block 370 units are renter occupied and 519 are owner occupied by African American householders.

[9] A good analysis of such statistical evidence is found in Hallmark Developers, Inc. v. Fulton County, Ga., 386 F.Supp.2d 1369 (N.D. Ga. 2005), and J&V Dev., Inc. v. Athens-Clarke Co., 387 F.Supp.2d 1214 (M.D. Ga. 2005).

> 19. Of the 149 lots in Villas West II,

there are 147 dwellings owned by white persons and 2 dwellings owned by African Americans. The racial mix of Villas West II is 98.7% white to 1.3% African American. The racial mix of the City of Kokomo is 86.69% white to 10.54% African American and 2.77% other racial minorities.

20. In the City of Kokomo there are 1,925 housing units which are occupied by African American householders. 889 of those are occupied by householders who own units and 1,036 are occupied by householders who rent units. 1,036 [divided by] 1,925 = 54% of African American householders in the City of Kokomo rent their dwellings. The average household size of housing units occupied by African American householders is 2.4 persons. Doing the math, there are 1,036 x 2.4 = 2,486 persons who live in African American rented housing units.

21. The covenants which remove housing units within Villas West II from the rental market effectively exclude the 1,036 African American householders who rent housing units from the subdivision. This is, 54% of all African American householders in Kokomo are

excluded from the subdivision.

22. In the City of Kokomo there are 2,602 housing units which are occupied by racially minority householders. 1,156 of these are occupied by householders who own units and 1,446 of those are occupied by householders who rent units. 1,446 [divided by] 2,602 - 56% of all racially minority householders in Kokomo rent their dwellings.

23. The covenants which remove housing units in Villas West II from the rental market effectively exclude the 1,446 racially minority householders who rent housing units in the City of Kokomo from the subdivision.

24. There are 18,827 housing units which are owned or rented by White along householders in the City of Kokomo. 6,431 are renter occupied. Therefore 6,431 [divided by] 18,827 - 34% of White along householders are excluded from the subdivision by the covenants.

25. The covenants exclude 56% of racial minority householders from the subdivision, and only 34% White along householders from the subdivision.

26. According to the testimony of Dr. Lauster, the models which he used

showed that African American householders in Kokomo are far more likely to rent their homes than White householders. For example, comparing 30 year old persons with $40,000 per year income, an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home.

27. The covenants have a greater adverse effect on the African American and racial minority householders than on white householders.

28. The covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority household who could rent homes in the subdivision if home were available.

29. By the Association's evidence, 27% or 28% of African American households have income sufficient to rent homes in Villas West II if such homes were available for rent.

30. By excluding all renters from Villas West II, the Association excludes minority households who can afford

> to rent homes in the subdivision as well as those who cannot afford to rent homes in the subdivision.

Appellant's Appendix at 15-18. The trial court concluded that: "The statistics that [McGlothin] presented to the Court clearly prove that the restriction has a significantly greater negative impact on African American members of this community than it does on the Caucasian population." Id. at 20.

The trial court found, and the Association does not dispute, that 54% of all African American householders in Kokomo rent, while 34% of all Caucasian householders in Kokomo rent. Further, comparing 30-year-old persons with a $40,000 per year income, 68% of such African Americans rent as compared to only 34% of such Caucasian persons. The Association's expert testified that the approximate market value of McGlothin's home is $101,000, and the approximate market value for rental of the home is $750 to $800 per month. Further, only 27-28% of African American renters could afford to rent the residence. The Association's expert gave no indication of the percentage of Caucasians that could afford to rent the residence. We conclude that the evidence presented at trial establishes that McGlothin made a significant statistical showing of a disparate impact, and this factor weighs in favor of McGlothin. See e.g., Hispanics United, 988 F.Supp. at 1155 (concluding that the plaintiffs demonstrated a discriminatory effect where 49 percent of those affected by the redevelopment plans were Hispanic while only 13.4 percent of the village's population was Hispanic.)

2. Legitimacy of the Association's Interest.

The next Arlington II factor is "the legitimacy of the defendant's interest in taking the action complained of." Phillips, 685 F.2d at 190. In Arlington II, the Seventh Circuit noted that "[i]f the defendant is a private individual or a group of private individuals seeking to protect rights, the courts cannot be overly solicitous when the effect is to perpetuate segregated housing." Arlington II, 558 F.2d at 1293 (citing Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976).

On this issue, the trial court found: "The Association's reason for excluding renters from the subdivision is that renters do not maintain homes which they rent as well as owners maintain their homes. Therefore, the exclusion of renters helps maintain property values." Appellant's Appendix at 18. The trial court found "no sowing that the limiting of occupancy of dwellings within Villas West II to owners and members of their immediate families is a business necessity," "no business necessity that owners of dwellings within Villas West II be prohibited from renting or leasing their dwellings," and "no business necessity that the class of person designated as 'renters' be excluded from Villas West II." Id. at 19. Thus, the trial court concluded that it could "find no legitimate non-discriminatory reason for limiting occupancy of dwellings within Villas West II to owners and members of their immediate families." Id.

The Association argues that restrictive covenants that prevent leasing are found throughout the United States and that such covenants have a positive effect

in maintaining property values. The Association's expert, Paul Wyman, testified that covenants restricting or prohibiting leasing either increase or help maintain property values because renters generally do not maintain houses as well as owners. Although McGlothin's expert, Nick Tillema, testified on direct examination that such covenants against leasing reduce property values by restricting a homeowner's rights. Tillema testified on cross examination that he had used such covenants in his properties by allowing only ten percent of the homes to be leased. Tillema further testified that if all of the properties in a development could be leased, it might adversely affect property values.

The developer of Villas West II testified that McGlothin's residence was a "duplex condo-style" home but not a true condominium. Transcript at 161. However, the developer did not explain the difference between these concepts. We note that other courts have recognized that condominiums are unique. In Woodside Village Condominium Assoc., the Florida Supreme Court noted:

> From the outset, courts have recognized that condominium living is unique and involves a greater degree of restrictions upon the rights of the individual unit owners when compared to other property owners. *See Seagate Condominium Ass'n [v. duffy*, 330 So.2d 484, 486 (Fla. Dist. Ct. App. 1992)] (citing cases). For instance, in *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla. 19779), we recognized that

"[r]easonable restrictions concerning use, occupancy and transfer of condominium units are necessary for the operation and protection of the owners in the condominium concept." *Id.* at 350. In *White Egret*, we quoted favorably from *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 45h DCA 1975), to further explain the restrictive nature of condominium ownership and living:

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

White Egret, 379 So.2d at 350. Consistent with this analysis of condominium ownership, courts have acknowledged that "increased controls and limitations upon the rights of unit owners to transfer their property are necessary concomitants of

> condominium living." *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166, 1167 (Fla. 3d DCA 1984). Indeed, section 718.104(5), Florida Statutes (2000), expressly recognizes that a declaration of condominium may contain restrictions concerning the use, occupancy, and transfer of units. *See* § 718.104(5), Fla. Stat. (2000).
>
> Courts have also consistently recognized that restrictions contained within a declaration of condominium should be clothed with a very strong presumption of validity when challenged.

Woodside Vill. Condo. Assoc., 806 So.2d at 456-457.

The trial court focused upon whether the Association has a "business necessity" for the restrictive covenant. However, the proper consideration is whether the Association had a legitimate interest in restricting leasing. Even McGlothin's expert agreed that leasing can have an adverse effect on property values. Additionally, the unique nature of these "condo-style" homes provide a legitimate justification for a leasing restriction. Thus, this Arlington II factor weighs in favor of the Association.

3. Indication of Discriminatory Intent.

The next Arlington II factor is "some indication - which might be suggestive rather than conclusive - of discriminatory intent." Phillips, 685 F.2d at 190. This factor "is the least important of the four factors, . . . and the required showing under it is modest."

Hispanics United, 988 F.Supp. at 1157 (citing Arlington II, 558 F.2d at 1292).

The trial court found no indication of discriminatory intent of the Association. However, the trial court did make the following findings that are relevant to this analysis:

> 13. Villas West II is a part of the Willowridge Community. Jim Bagley Construction Co., Inc. advertises the Willowridge Community as "Restricted - your investment is protected here."
>
> 14. The word, "restricted," is defined by Webster's Third International Dictionary (1993), as "limited to the use of a particular class of people or specifically excluding others (as members of a class or ethnic group felt to be inferior) (a residential area) (-hotels. . ." Other dictionary definitions include" . . . limited to white Christians," and ". . . limited to or admitting only members of a particular group or class, esp. white gentiles."

Appellant's Appendix at 14. The trial court also noted that "[o]f the 149 lots in Villas West II, there are 147 dwellings owned by white persons and 2 dwellings owned by African Americans." Id. at 15. The trial court then concluded:

> Whether the builder of the tract realized it or not, the words "restricted," as

> used in its advertisements clearly sent a message to the African American community. Dr. Herbert Mitler, an African American professor at Indiana University-Kokomo, himself a victim of past discrimination, very eloquently and convincingly described how the word "restricted" is what the black community commonly knows to be a "code word" indicating that African Americans (and perhaps other minorities) are not welcome.
>
> While the Plaintiff demonstrated that a few African Americans do own homes in Villas West II, thereby attempting to counter any discriminatory effect arguments, such evidence was not persuasive. Thankfully, this country's laws are now such that it is virtually impossible to manifestly deny ownership of a home to a minority member or family. A no-rent provision accomplishes a similar goal, however, in a more subtle way.

Id. at 19-20.

The Association argues that the advertisement of Jim Bagley Construction cannot be imputed to the Association. While in general we would agree with the Association, we note that Jim Bagley Construction recorded the covenants at issue here. The Association is charged with enforcing the covenants recorded by Jim Bagley Construction. Thus, although there is no indication of discriminatory intent of the Association, evidence suggestive of discriminatory intent of Jim Bagley

Construction would be relevant to whether the covenant has a legitimate purpose.[10] We conclude that this factor weights slightly in favor of McGlothin.

4. Extent of Relief.

The final Arlington II factor is "the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant." Phillips, 685 F.2d at 190. The trial court made no findings on this issue. However, relief here could be obtained by limiting the Association's right to enforce the leasing covenant rather than requiring the Association to institute positive remedial measures. Thus, this factor weights in favor of McGlothin.

B. Burden of Proof.

As noted above, if a plaintiff makes a prima facie showing, the defendant has the burden of proving a bona fide and legitimate justification for the housing action. Hispanics United, 988 F.Supp. at 1162. If the defendant makes this showing, the plaintiff has

[10] McGlothin also relies upon Kokomo's "sordid history of perverse willful schemes for perpetuating segregation through restrictive covenants" that limited occupancy to those of "the pure white race." Appellee's Brief at 29; Appellee's Appendix at 18. Such evidence is not relevant or suggestive of discriminatory intent on the part of Jim Bagley Construction or the Association with respect to the restrictive covenant barring leasing.

the burden of proving that less discriminatory alternatives were available. Id.

1. McGlothin's Prima Facie Case.

As noted above, the federal courts in the Seventh Circuit have held that "Plaintiffs can establish a prima facie disparate impact case under the [Act] simply by showing that Defendants' actions had discriminatory effects upon a protected class." Wallace, 321 F.Supp.2d at 973-974. Disparate impact in fair housing cases can be illustrated with statistics. Hispanics United, 988 F.Supp. at 1154. "Local, not national, statistics are usually most pertinent, and the analysis 'must involve the appropriate comparables.'" Id. (quoting Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1251, 1253 (10th Cir. 1995)). The Association does not dispute that McGlothin made a statistical showing of a disparate impact. Appellant's Brief at 13 ("[McGlothin] did assert voluminous statistical evidence and may have asserted sufficient evidence to make a prima facie showing of disparate impact."). Thus, McGlothin made a prima facie case, and we will consider whether the Association had a bona fide and legitimate justification.

2. The Association's Bona Fide and Legitimate Justification.

If a plaintiff makes a prima facie showing, the defendant has the burden of proving a bona fide and legitimate justification for the housing action. Hispanics United, 988 F.Supp. at 1162. Because McGlothin made a prima facie showing of a violation of the Act, the Association had the burden of proving a bona fide and legitimate justification for the

restrictive covenant. The Association argued that the leasing restriction had a positive effect on property values. As we noted in discussing the Arlington II factors, even McGlothin's expert agreed that leasing can have an adverse effect on property values. Additionally, the unique nature of these "condo-style" homes provide a legitimate justification for a leasing restriction. Thus, we conclude that the Association provided a bona fide and legitimate justification for the covenant against leasing.

3. Availability of Less Discriminatory Alternatives.

If the defendant demonstrates a bona fide and legitimate justification, as the Association did here, the plaintiff then has the burden of proving that less discriminatory alternatives were available. Hispanics United, 988 F.Supp. at 1162. The trial court found:

> [T]he Declaration of Covenants contains numerous provisions requiring proper maintenance; these include the following, which are included herein by reference:
>
> Article V. Sections 1
> Article V. Sections 2
> Article V. Sections 2-A
> Article IX. Sections 3(a)
> Article IX. Sections 3(c)
> Article IX. Section 3(d)
> Article IX. Section 3(e)
> Article IX. Section 3(f)
> Article IX. Section 3(g)
> Article IX. Section 3(I)
> Article IX. Section 3(j)

> The Plaintiff has, by these provisions, more than adequately assured a neat, clean and visually attractive environment, and a high degree of property maintenance. The Defendant would still be held to these requirements even while renting her home. Therefore, the Plaintiff's justification for the no-rent provision lacks a factual basis, and is mere subterfuge, rendering said provision unnecessary and useless.

Appellant's Appendix at 18-19.

The covenants cited by the trial court in its findings govern exterior maintenance, maintenance of the dwelling, watering of lawns and shrubs, and prohibited uses and nuisances, such as noxious or offensive activities, accumulation of litter or trash, accumulation of junk vehicles, campers, boats, etc. on the property, construction of outbuildings, and leaving garage doors open. The trial court basically found that, if the basis for the leasing covenant is to maintain property values because renters do not care for the residences as well as owners, the properties can be maintained just as well through the covenants listed above. We cannot say that this finding is clearly erroneous.

In summary, we conclude that the trial court's finding that the restrictive covenant against leasing violated the Fair Housing Act is not clearly erroneous. McGlothin made a prima facie showing of a violation of the Act, and, although the Association demonstrated a bona fide and legitimate justification for the housing action, McGlothin showed that less

discriminatory alternatives were available. Hispanics United, 988 F.Supp. at 1162. Of the four Arlington II factors, three factors favor McGlothin, although one of those factors favors her only slightly, and one factor favors the Association. While we think this is a close case, we cannot say the trial court's finding of a violation of the federal Fair Housing Act is clearly erroneous. In doing so, we do not intend to imply that all restrictive covenants prohibiting leasing violate the federal Fair Housing Act. Rather, this is complex, fact-sensitive analysis that should not be taken to apply to all such covenants.[11]

For the foregoing reasons, we affirm the trial court's judgment in favor of McGlothin.

Affirmed,

DARDEN, J. and BAILEY, J. concur

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[11] Because we conclude that the trial court's findings on the Fair Housing Act are not clearly erroneous, we need not address McGlothin's argument that the judgment is sustainable on equitable grounds.

In The Indiana Supreme Court
No. 34S02-0805-CV-266

VILLAS WEST II OF WILLOWRIDGE HOMEOWNERS ASSOCIATION, INC.

Appellant (Plaintiff / Cross-Defendant Below),

v.

EDNA McGLOTHIN,

Appellee (Defendant / Cross-Claimant Below).

FILED MAY 15, 2008
Kevin S. Smith, Clerk
Supreme Court, Court of Appeals, and Tax Court
STATE OF INDIANA

Appeal from the Howard superior Court II,
No. 34D02-0210-PL-893
The Honorable Stephen M. Jessup, Judge

On Petition to Transfer from the Indiana Court of Appeals, No. 34A02-0504-CV-370

May 15, 2008

Shepard, Chief Justice.

A homeowner whose deed contained various covenants applicable to her subdivision rented out her residence, notwithstanding a covenant not to do

so. Her homeowners association sued to enforce the prohibition, and she countersued, claiming that the agreement she had made through the covenant violated the Fair Housing Act. Her counter-complaint appeared to include elements of two very different claims – disparate impact and intentional discrimination.

The trial court granted her relief, appearing largely to rely on disparate impact. We conclude that relief on these grounds was erroneous. We remand for reconsideration of the intentional discrimination claims.

Facts and Procedural History

Algy and Edna McGlothin, husband and wife, purchased a home in Villas West II Planned Unit Development of Willowridge Subdivision on August 26, 1996. Villas West II is a 149-lot development located in the City of Kokomo. [1]

The McGlothins purchased their home subject to "any and all easements, agreements and restrictions of record." One of these provisions prohibited owners from leasing their residences:

> Lease of Dwelling by Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family.

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[1] Villas West II was platted in April 1990 and developed by Jim Bagley Construction Co., Inc. (Appellant's App. at 10.)

(Appellant's App. at 43.)[2]

Mrs. McGlothin lived in the home until she broke her hip in 1998 and moved to a nursing home. Mr. McGlothin lived in the home another five months until he also moved into the nursing home. Mr. McGlothin remained in the nursing home until his death in June 1999. After Mr. McGlothin's death, the McGlothin's daughter began leaving out the home.

On August 20, 2002, the Villas West II Homeowners Association notified the McGlothin's daughter that Mrs. McGlothin was in violation of the no-lease covenant and demanded compliance. In response, Mrs. McGlothin's lawyer acknowledged the covenant, but argued that the rent payments were necessary to maintain Mrs. McGlothin in the nursing home.[3] He also stated that the no-lease provision could be invalid, alleging it had racially discriminatory roots.

Although not unsympathetic to Mrs. McGlothin's situation, the Homeowners Association declined to acquiesce in her violation of the no-lease covenant,

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[2] The no-lease covenant was recorded in April 2, 1992. (App. at 11.)

[3] The trial court found that pursuant to 405 Ind. Admin Code 2-3-15(c)(10), "Edna McGlothin was entitled to own her own home *and* receive Medicaid benefits so long as the rental income from her home [was] greater than the expenses of ownership." (App. at 12-13 (emphasis added)). Because Medicaid had already advanced $23,363.66 for Mrs. McGlothin's care, the court determined a lien could be placed on Mrs. McGlothin's home to secure repayment and could be foreclosed upon Mrs. McGlothin's death *or* if the property was sold prior to her death. (Id. at 13.)

citing concerns "about its residents and the economic consequences the violation could have on the neighborhood and property values as a whole." (Id. at 92.) The Homeowners Association demanded that the tenant vacate the premises to avoid further legal action and attached a draft complaint seeking an injunction against the renting of the premises, the eviction of the current tenant, attorney fees, and all other damages.

Unable to resolve the matter, the Homeowners Association filed the complaint on October 10, 2002. Mrs. McGlothin subsequently filed her answer, affirmative defense, and counterclaim alleging the Association's enforcement of the no-lease covenant violated the Fair Housing Act. The Homeowners Association moved for summary judgment, which the trial court denied.

After a bench trial, the court concluded that the covenant violated the Fair Housing Act, finding it had a greater adverse effect on African Americans and racial minorities and finding "no legitimate non-discriminatory reason" for the no-lease covenant. (Id. at 17-19.) The court entered judgment for Mrs. McGlothin. The Homeowners Association appealed, and the Court of Appeals affirmed. Villas West II of Willowridge, Homeowners Ass'n, Inc. v. McGlothin, 841 N.E.2d 584, 608 (Ind. Ct. App. 2006). We grant transfer, reverse, and remand.

I. The Prevalence of Real Estate Covenants

A restrictive covenant is an express contract between grantor and grantee that restrains the grantee's use of his land. Holliday v. Crooked Creek

Villages Homeowners Ass'n, Inc., 759 N.E.2d 1088 (Ind. Ct. App. 2001). Covenants control many aspects of land, including what may be built on the land (fence or above ground pool), how the land may be used (private or commercial), and alienability of the land. See, e.g., Robert G. Natelson, Law of Property Owners Associations 56-58, 153-66 (1989).

Restrictive covenants are used to maintain or enhance the value of land by reciprocal undertakings that restrain or regulate groups of properties. Holliday, 759 N.E.2d at 1092. These covenants are common in condominium or other "common-interest" housing subdivisions. Prior to selling the first unit or plat, the subdivision or condominium owner creates a declaration or master deed that contains all of the restrictions.[4] Property owners who purchase their properties subject to such restrictions give up a certain degree of individual freedom in exchange for the protections from living in a community of reciprocal undertakings.

Restrictions found in a declaration (like those found in a master deed) "are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." Hidden Harbour Estates, Inc. v. Basso,

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[4] The declaration or master deed setting for the association's powers over the subdivision and describing use restrictions is typically called the "Declaration of Conditions, Covenants, and Restrictions" or "CC&Rs." The recording of the declaration coupled with the sale of the units creates the various restrictive covenants, easements, and affirmative covenants detailed in the

declaration. Natelson, supra, at 58.

393 So.2d 637, 639 (Fla. Dist. Ct. Ap. 1981). Analogizing restrictions in declarations to covenants running with the land, the Basso court held that restrictions in the declaration "will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right." Id. at 639-40. Today, as the Basso court anticipated, restrictive covenants function identically in planned subdivisions and condominiums and function identically regardless of whether they are found in a master deed or a declaration. Natelson, supra, at 58-60 ("the integration between the law of condominium and the law of other *covenanted subdivisions* is well on the way to being complete," and thus, not proper "to speak or write of 'condominium law' and 'homeowners association law' as if they were discrete topics). [5]

Condominium associations frequently adopt no-lease covenants that bar rental of units and forbid absentee ownership. Jordan I. Shifrin, No-Leasing Restrictions on Condominium Owners: The Legal Landscape, 94 Ill. B.J. 80, 80-81 (2006). These covenants are adopted to address owners' concerns "about the negative effects of high resident turnover and renters' perceived lack of attention to the property." Id. at 80. Some empirical data validates

[5] The use of restrictive covenants is certainly commonplace in this state. A Google search using the phrases "restricted subdivision" and "Indiana" returns 3,320 websites.

these concerns; a California study showed that "[a] high number of leased units (over 30%) can impair significantly the market position of the subdivision." Robert G. Natelson, Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association, 51 Ohio St. L.J. 41, 73 n. 150 (1990). Courts commonly enforce no-lease restrictive covenants.[6] See, e.g., Flagler Fed. Sav. & Loan Ass'n v. Crestview Towers Condo. Ass'n, Inc., 595 So.2d 198 (Fla. Dist. Ct. App. 1992) (association may prohibit leasing; restrictions in declaration presumed valid); Seagate Condo. Ass'n, Inc. v. Duffy, 330 So.2d 484 (Fla. Dist. Ct. App. 1976) (leasing restrictions not unreasonable restraints on alienation; restrictions promote residential character of community); Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93, 99 (Ill. App. Ct. 1995) (leasing prohibition made part of declaration presumed valid and upheld unless restriction "arbitrary, against public policy or violates some fundamental constitutional right of the unit owners").

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[6] Courts commonly enforce both covenants initially included in a subdivision's declaration, as well as those added later through amendments. Shifrin, supra, at 81 ("The constitutionality of these no-renter covenant modifications has been challenged repeatedly since the mid-'70s. With rare exceptions, the right of condominium owners to modify their governing documents has been consistently upheld.")

II. Disparate Impact Claims Under the Fair Housing Act

Still, agreements to limit the use of real property are subject to challenge under other law. The challenge here is based on the Fair Housing Act (FHA), enacted as Title VIII of the Civil Rights Act of 1968. FHA claims can take either of two routs: disparate treatment or disparate impact.

Disparate treatment claims require proof of intentionally discriminatory treatment of a protected class. Disparate impact claims, by contract, require no proof of intent, and can be established if a policy or practice has a discriminatory effect on a protected class, even if the policy or practice is facially nondiscriminatory. Disparate impact recovery was first allowed in employment discrimination cases under Title VII of the Civil Rights Act of 1964. See Griggs v. Duke Power Co, 401 U.S. 424 (1971). Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge" a person "because of" a prohibited reason such as race. 42 U.S.C.A. § 2000e-2(a)(1) (West 2008). Title VII uses the same critial language, making it unlawful to "refuse to sell or rent . . . a dwelling to any person because of" race. 42 U.S.C.A. § 3604. Based on this identical language, disparate impact recovery under the FHA has been allowed by all federal circuit courts that have addressed the question. [7]

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[7] 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006) (citing John F. Stanton, The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination, 31 Hofstra L. Rev. 141, 174 n. 180 (2002) (listing cases)).

There is wide agreement in the federal circuit courts that the FHA allows disparate impact claims, but no consensus about the proper framework for analyzing such a claim.[8] The U. S. Supreme Court has not addressed the issue, and circuits have developed a variety of approaches, for the most part derived from three early FHA disparate impact cases, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (Arlington Heights II),[9] Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977), and Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).

In Arlington Heights II, the Seventh Circuit held that disparate impact recovery under the FHA is proper when the defendant's conduct produces a discriminatory effect and four factors balance in favor of granting relief. The four factors are (1) the strength of the plaintiff's showing of discriminatory effect; (2) evidence of discriminatory intent, though

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[8] See John E. Theuman, Annotation, Evidence of Discriminatory Effect Alone as Sufficient to Prove, or to Establish Prima Facie Case of, Violation of Fair Housing Act, 100 A.L.R. Fed. 97, § 3 (1990). See also C.H.R.O. v. Ackley, No. CV99550633, 2001 WL 951374, at *3 (Conn. Super. Ct. July 20, 2001), in which a Connecticut trial court looked to this annotation and concluded that "a cursory reading of that article and many of the cases cited set forth such a morass of differing opinions in the federal cases on fundamental issues that this court will simply rely on Second Circuit law."

[9] This case is commonly referred to as Arlington Heights II to distinguish it from the Seventh Circuit's earlier ruling in the same case, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

not enough to satisfy the constitutional standard of Washington v. Davis; (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or merely to restrain the defendant from interfering with individual property owners who wish to provide housing. Arlington Heights II, 558 F.2d at 1290.

One month after Arlington Heights II, the Third Circuit adopted a burden-shifting framework similar to that already in use in Title VII employment cases. Rizzo, 564 F.2d at 148. Under this approach, the plaintiff makes a prima facie case by showing that the defendant's action has a discriminatory effect. Id. The defendant can rebut this by showing a justification which "serve[s], in theory and in practice, a legitimate, bona fide interest" and by showing that "no alternative course
of action could be adopted that would enable that interest to be served with less discriminatory impact." Id. at 149. The Rizzo court did not apply the Arlington Heights II factors but acknowledged that the result would have been the same. Id. at 148 n.32.

A decade later, the Huntington court sought to merge Rizzo and Arlington Heights II. Under the Huntington framework, the plaintiff establishes a prima facie case by showing that the "challenged practice of the defendant actually or predictably results in racial discrimination." Huntington, 844 F.2d at 934. The defendant can rebut this case by showing that its "actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that

interest with less discriminatory effect." The court then balances the four Arlington Heights II factors to determine whether to grant relief. Id. at 936.

These competing approaches spawned a variety of others. One source of disagreement was the role, if any, of the Arlington Heights II factors. A few courts have used the factors as part of the prima facie case. See, e.g., Smith v. Town of Clarkton, 682 F.2d 1055, 1065-66 (4th Cir. 1982); Snyder v. Barry Realty, Inc., 953 F. Supp. 217, 220 (N.D. Ill. 1996). This approach has been widely rejected as making the plaintiff's case too difficult. E.g., Rizzo, 564 F.2d at 148 n.32; Huntington, 844 F.2d at 935; Hispanics United v. Vill. of Addison, 988 F. Supp. 1130, 1154 n. 14 (N.D. Ill. 1997). Other courts applied the Arlington Heights II factors only in cases involving public defendants. E.g., Betsey v. Turtle Creek, Assocs., 736 F.2d 983, 989 n.5 (4th Cir. 1984). Still others discarded the second Arlington Heights II factor – proof of discriminatory intent – and weighed the remaining three, reasoning that intent was relevant only in disparate treatment cases. E.g., Mountain Side Mobile Eastates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1252 (10th Cir. 1995) Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986).

More recently, most federal circuits have abandoned the Arlington Heights II factors altogether. E.g., Charleston Hous. Auth. v. U.S. Dept. of Agric., 419 F.3d 729 (8th Cir. 2005); Tsombanidis v. West Haven Fire Dept., 352 F.3d 565 (2d Cir. 2003); Lapid-Laurel, L.L.C. v. Zoning Bd. of

Adjustment, 284 F.3d 442 (3d Cir. 2002); Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) ("True, one circuit court decision did refer to balancing, but the few later circuit court decisions on point come closer to a simple justification test, and we think this is by far the better approach.") (citations omitted); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998). Yet, at least one circuit and several district courts have continued to balance. Reinhart v. Lincoln County, 482 F.3d 1225, 1229 (10th Cir. 2007) (balancing three factors); Thompson v. U.S. Dept. of Hous. & Urban Dev., 348 F. Supp. 2d 398, 417 (D. Md. 2005) (balancing four factors); Peoria Area Landlord Ass'n v. City of Peoria, 168 F. Supp. 2d 917, 921-22 (C.D. Ill. 2001) balancing four factors); Corp. of Episcopal Church v. W. Valley City, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (balancing four factors).

Huntington's burden-shifting framework has also morphed. Several courts changed Huntington's two burdens into three. See, e.g., Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 902-03 (8th Cir. 2005); Harris v. Itzhaki, 183 F.3d 1043, 1051 (9th Cir. 1999); Mountain Side, 56 F.3d at 1264; Hispanics United, 988 F. Supp. at 1162. This test still requires plaintiffs to show a discriminatory effect, but rebutting defendants need to provide only a bona fide, nondiscriminatory justification. Once the defendant offers an appropriate justification, the burden shifts back to the plaintiffs to show an alternative that would serve the defendant's interest with less discriminatory effect. Courts adopting this approach explain that requiring the plaintiff to

propose an alternative gives the plaintiff the ultimate burden of proving a violation and has the advantage that "neither party is saddled with having to prove a negative (nonexistence of bona fide reasons or the absence of less discriminatory alternatives)." Hispanics United, 988 F. Supp. at 1162.

Finally, a much smaller number of federal courts have applied a variant of the disparate treatment test from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a leading employment discrimination case, to resolve disparate impact FHA claims. Under this approach, the plaintiff must prove a discriminatory effect, which the defendant may rebut by offering a legitimate, nondiscriminatory reason for its rule. Instead of the plaintiff then showing a less discriminatory alternative, the plaintiff shows the defendant's offered reason is a pretext. United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992); Snyder, 953 F. Supp. at 220.

Federal district courts in the Seventh Circuit are of course obligated to follow Seventh Circuit precedent, including Arlington Heights II. We are not so restricted, and it appears that Snyder, a district court opinion on which Arlington Heights II relied, is out of the mainstream of federal authority.

Moreover, Arlington Heights II seems doctrinally unsound. In employment disparate impact cases, burden-shifting tests are favored over factor-balancing tests. See Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); Dothard v. Rawlinson, 433 U. S. 321, 329 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Because Title VII and the FHA use the same language in prohibiting discrimination,

we should apply the same framework to both. Moreover, mixing the Arlington Heights II factors with the burden-shifting framework produces an unnecessarily complex process and introduces improper considerations. The burden-shifting framework accommodates the two relevant Arlington Heights II factors by considering the strength of the discriminatory effect of the challenged practice and the defendant's interest necessitating it. The remaining two factors – form of relief and intent – are improper considerations in the disparate impact context.

The relief sought is an inappropriate consideration because the FHA specifically authorizes courts to award "preventive relief, including a permanent or temporary injunction, restraining order, or other order." It sets out no higher standard for plaintiffs seeking affirmative relief. 42 U.S.C.A. § 3614(d)(1)(A).

Intent is an improper consideration because in disparate impact cases the disparate impact itself is the violation, irrespective of intent. See Mountain Side, 56 F.3d at 1252. For the same reason, the third burden should address less discriminatory alternatives, not pretext. Pretext is a means of finding subjective intent to discriminate. The more persuasive federal courts have specifically held that current FHA disparate impact law does not involve pretext. See Huntington, 844 F.2d at 939 ("The McDonnell Douglas test, however, is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here. No circuit, in an impact case, has required plaintiffs to prove

that defendants' justifications were pretextual.").

These observations lead us to reject the Arlington Heights II approach and, with it, any search for pretext in a disparate impact case. Instead, we adopt the prevailing test, which involves two shifts, not one. Requiring the plaintiff to identify a specific less restrictive alternative is more efficient and fair than requiring the defendant to "guess at and eliminate" all possible alternatives. Hispanics United, 988 F. Supp. at 1162.

In sum, to establish a right to disparate impact recovery under the FHA, a plaintiff must establish a prima facie case by demonstrating that a policy or practice actually or predictably has a significantly adverse or disproportionate impact on a protected class. To rebut this showing, the defendant must demonstrate that its policy or practice has a manifest relationship to a legitimate, nondiscriminatory interest. The plaintiff may then overcome the defendant's showing by demonstrating that a less discriminatory alternative would serve the defendant's legitimate interest equally well.

We now turn to application of this disparate impact framework to the record in this case. The no-lease covenant at issue provides:

> Lease of Dwelling by Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family.

(App. at 43.) McGlothin contends that the no-lease covenant violates the FHA because it has an impermissible disparate impact on African Americans. The trial court so found. (Id. at 20.) Evidence presented at trial showed that regardless of income and age, African Americans rent their homes in greater proportion than do whites. (Id. at 16-17.) The decrease is available rental housing caused by the no-lease covenant will predictably and disproportionately affect African Americans. While the evidence supporting this finding leaves something to be desired, we will proceed on the basis that the prima facie case is established.

The Homeowners Association sought to rebut this prima facie case by demonstrating that its no-lease provision has a manifest relationship to a legitimate, nondiscriminatory interest. The trial court found that the Association's reason for excluding renters from the subdivision is that "renters do not maintain homes which they rent as well as owners maintain their homes. Therefore, the exclusion of renters helps maintain property values." (Id. at 18.) The record contains ample expert testimony supporting this proposition. (Tr. at 65-67, 230.)

Because the Association asserted a legitimate, nondiscriminatory reason for its no-lease covenant, the burden returned to McGlothin to propose an equally effective, less discriminatory alternative. McGlothin drew the trial court's attention to several other covenants which the trial court found "more than adequately assured a neat, clean and visually attractive environment, and a high degree of property

maintenance." (App. at 18.) These covenants require homeowners to, among other things, maintain windows, door hardware, patios, and appliances; water lawns and shrubs; keep the exterior free of trash, certain signs, certain communication devises, and certain vehicles; and "promptly perform all maintenance and repair . . . which, if neglected, might adversely affect any other Dwelling, Common Area or the value of the Property." (Id. at 33-35, 38-42.) Because these additional covenants were in place, the trial court found that "the Plaintiff's justification for the no-rent provision lacks a factual basis, and is mere subterfuge, rendering said provision unnecessary and useless." (Id. at 18-19.) Ultimately, the trial court found the covenant to violate the FHA.

This record does not support a claim under a disparate impact theory. Although the specific property-maintenance covenants are a less discriminatory alternative to promote maintenance, the covenants are not an equally effective means of maintaining property values. Maintaining property values involves not merely maintaining property but also improving and updating it. Under these covenants, owners are obligated only to maintain the home, not to improve or update it. Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home.

In a rental situation, however, this incentive is weakened because of divided ownership and occupancy. The renter lacks some incentive to

improve the property because he or she would only benefit from the current enjoyment, not from an increased market value. Because the additional property-maintenance covenants do not address the problem of divided interests in rental property, they are not an equally effective, less discriminatory alternative to excluding renters. Moreover, although there is nothing in this record directly addressing the point, it seems obvious that an owner-occupant is both psychologically and financially invested in the property to a greater extent than a renter.[10] Personal motivation can surely achieve better results than contractual compulsion in many cases. This is not a matter of reweighing evidence. Both parties' experts testified that owners maintain property better than do renters. (Tr. at 66, 86, 230-31.) Because the evidence on this point is undisputed, to the extent the trial court found these other covenants equally adequate to maintain property values, the trial court findings on this point are clearly erroneous.

Because plaintiff points to no equally effective, less discriminatory alternatives to the defendant's legitimate nondiscriminatory policy, that policy does not support a disparate impact FHA violation, even if it has a disparate impact on a protected class.

III. Disparate Treatment

McGlothin's counterclaim contains certain allegations that are part of a disparate treatment

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[10] Surely, the psychology of this is recognized by prospective purchasers, who assess whether to make purchases based in part on expectation that owner-occupant neighbors are likely to make such investments in maintenance.

claim under the FHA. In her counterclaim, McGlothin alleged that

> 20. In making said covenant . . . the developer evidenced an intention to make a preference, limitation, or dis-crimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin.
>
> 21. In seeking to enforce said covenant provision, members of Villas West II orWillowridge Homeowners Association, Inc. evidence an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin.

(App. at 55-56.) The trial court's findings (and the trial record on intentional discrimination) reflect certain contradictions. The court found that there was no conclusive evidence of discriminatory intention behind the Homeowners Association's attempt to enforce the no-lease covenant. At the same time, it found the no-lease covenant to be a "subterfuge," suggesting pretext. (Id. at 19.) This finding as to the underlying motivation for the covenant flows from a McGlothin witness who said the term "restricted" (used here in a developer's advertisement) is understood by minorities, especially African Americans, to be synonymous with "segregated." (Tr. at 304.) Two African American residents of Villas West II also testified on this point. One African American resident testified that she did

not think the covenant language indicated a racial preference or exclusion. Another African American resident testified that the language in the covenant and the developer's advertisements did not convey any racial discrimination and that she welcomed the covenant because renting had an adverse effect on property values. (Id. at 319-21, 324-27.)

The trial court's findings about the developer's intent are likewise ambiguous: "Whether the builder of the tract realized it or not, the words 'restricted,' as used in its advertisements clearly sent a message to the African American community . . . that African Americans (and perhaps other minorities) are not welcome." (App. at 19-20.) There is no evidence that the Association ever promoted the subdivision as "restricted," but the no-lease covenant and advertisement did originate with the developer, who recorded the covenants and first controlled the Association. (Tr. at 15-16.) The record does not contain evidence regarding when advertisements using the word "restricted" were disseminated or whether those advertisements were linked to the Villas West II subdivision.

The nature of these findings and the fact that McGlothin's brief contains arguments mostly but not exclusively pertinent to disparate impact understandably led the Court of Appeals to conclude that "[o]nly disparate impact is at issue here." Villas West, 841 N.E.2d at 599. We find ourselves unable to discern whether relief is appropriate on McGlothin's intentional discrimination claim. The need for a fair adjudication suggests the desirability of remanding for further evidence and findings.

Conclusion

We reserve the judgment of the trial court on the claim of disparate impact and remand for reconsideration of the claim of intentional discrimination.

Dickson and Boehm, JJ., concur
Rucker, J., dissents with separate opinion in which Sullivan, J., concurs

Rucker, Justice, dissenting.

The majority works overtime and spends much ink to argue that Arlington Heights II is flawed and should not be followed. To be sure, as the Court of Appeals noted, "a uniform standard for determining liability based upon disparate impact remains elusive, and the disparate impact jurisprudence has been described as "an increasingly incoherent body of case law." Villas West II of Willowridge v. McGlothin, 841 N.E.2d 584, 599 (Ind. Ct. App. 2006) (quoting Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair and Lending Law, and the Antidiscrimination Principle, 47 Emory L.J. 409 (Spring 1998)). But even with its imperfections, several state and federal jurisdictions continue to follow the Arlington Heights II methodology. See, e.g., 2922 Sherman Ave. Tenants' Ass'n. v. District of Columbia, 444 F.3d 673, 680-82 (D.C. Cir. 2006); Anderson ex rel. Dowd v. City of

Boston, 375 F.3d 71, 83-90 (1st Cir. 2004); Reese v. Miami-Dade County, 242 F. Supp. 2d 1292, 1304-06 (S.D. Fla. 2002); Hill v. Cmty. of Damien of Molokai, 911 P.2d 861, 872-74 (N.N. 1996). Other than to make it exceedingly more difficult for legitimate victims of housing discrimination to press their claims, I see no reason to abandon this precedent. Indeed, applying the Arlington Heights II factors, both the trial court and the Court of Appeals concluded that Villas west's restrictive covenant violated the Federal Fair Housing Act because of its disparate impact on members of the African American community residing in the City of Kokomo. I agree and would affirm the judgment of the trial court. Therefore I dissent.

Sullivan, J., concurs.

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Court of Appeals No:
34A020504CV00370

Fax Number:

VILLAS WEST II OF WILLOWRIDGE -V- SHIRLEY ASHCRAFT, PER. REP

You are hereby notified that the SUPREME COURT has on this day 10/01/08 APPELLEE'S PETITION FOR REHEARING IS HEREBY DENIED WITHOUT OPINION.

RANDALL T. SHEPARD, CHIEF JUSTICE

DICKSON AND BOEHM, JJ., CONCUR
SULLIVAN AND RUCKER, JJ., WOULD GRANT REHEARING

KM

WITNESS my name and the seal of said Court,
this 1st day of OCTOBER, 2008

S/ Kevin S. Smith
Kevin S. Smith
Clerk, supreme Court, Court of
Appeals and Tax Court